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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-935

MARVIN ALLEN, STEVEN JACOBSMEYER and
UNKNOWN POLICE OFFICERS,
Petitioners,

vs.

WILLIE McCURRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Petition	6
I. The petition ought to be granted because the questions of federal law presented herein are of serious national importance and must be settled by this Court	6
II. The petition ought to be granted because the decision of the Court of Appeals is in direct conflict with the overwhelming weight of authority in the other circuits	15
III. The petition ought to be granted because the questions presented herein have been decided by the Court of Appeals for the Eighth Circuit in a manner which conflicts with other decisions of that court and also with decisions of the Supreme Court	17
Conclusion	20
Appendix A - Memorandum and Order of the District Court, October 13, 1978	A-1

Appendix B - Opinion of the Court of Appeals for the Eighth Circuit, October 1, 1979 ..... A-4

Appendix C - Opinion of the Missouri Court of Appeals, Eastern District, August 14, 1979 ..... A-13

Appendix D - Complaint filed in District Court A-21

Appendix E - Defendants' Motion to Dismiss and Motion for Partial Summary Judgment, with exhibit A-25

Appendix F - Plaintiff's Motion for Summary Judgment A-30

Cases Cited

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 9

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 13

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 9,19

Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) 15,17

Brubaker v. King, 505 F.2d 534 (7th Cir. 1974) 9, 13,15

California v. Minjares, ____ U.S. ____, 100 S.Ct. 9 (1979) 13

Curtis v. Tower, 262 F.2d 166 (6th Cir. 1959) 15

Ellis v. Dyson, 421 U.S. 426 (1975) 19

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951) 19

Entick v. Carrington, 19 State Trials 1030 (1765) 8

Fernandez v. Trias Monge, 586 F.2d 848 (1st Cir. 1978) 12

Firnhaber v.Sensenbrenner, 385 F.Supp. 406 (E.D.Wis. 1974) 9

Frank v. Mangum, 237 U.S. 309 (1915)..... 8,19

Goodrich v. Supreme Court of South Dakota, 511 F.2d 316 (8th Cir. 1975)..... 17,18

Grubb v. Public Utilities Comm., 281 U.S. 470 (1930) .. 8,19

Hunter v. Clardy, 558 F.2d 290 (5th Cir. 1977) 9

Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965) 17,18

Jones v. Bales, 58 F.R.D. 453 (M.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973)..... 17

Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970) 15,16,18,19

Kingston's (Duchess) Case, 1 East, P.C. 468, 20 State Trials 355, 168 Eng.Rep. 175 (1776) 8

Koger v. Guarino, 412 F.Supp. 1375 (E.D.Pa. 1976), aff'd, 549 F.2d 795 (3d Cir. 1977) 9

LaRose v. Casey, 570 S.W.2d 746 (Mo.App. 1978)..... 12

McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir.), cert. denied, 429 U.S. 855 (1976)..... 18

Martin v. Delcambre, 578 F.2d 1164 (5th Cir. 1978) 15

Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975)..... 9,15,16

Meadows v. Evans, 550 F.2d 345 (5th Cir. banc), cert. denied, 434 U.S. 969 (1977) 17

Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1970) 15,16,17

Mincey v. Arizona, 437 U.S. 385 (1978) 13

Monell v. Dept. of Social Services, 436 U.S. 658, 17 FEP Cases 873 (1978) 10

Monroe v. Pape, 365 U.S. 167 (1961) 14

Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).... 15

Ney v. California, 439 F.2d 1285 (9th Cir. 1971) 15

Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955), cert. denied, 351 U.S. 955 (1956)..... 17

P I Enterprises, Inc. v. Cataldo, 457 F.2d 1012, (1st Cir. 1972) 8

Palma v. Powers, 295 F.Supp. 924 (N.D.Ill. 1969) .. 8,12,15,17

Pierson v. Ray, 386 U.S. 547 (1967) 9,12,14

Preiser v. Rodriguez, 411 U.S. 475 (1973)..... 15,19

Pritz v. Hackett, 440 F.Supp. 592 (W.D.Wis. 1977) 9

Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (1977) 9,15,16

Robb v. Connolly, 111 U.S. 624 (1884)..... 8,19

Robbins v. District Court of Worth City, 592 F.2d 1015 (8th Cir. 1979)..... 17,18

Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973) 9

Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973) 9

Sealfon v. United States, 332 U.S. 575 (1948) 19

Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969) 17

Smith v. Sinclair, 424 F.Supp. 1108 (W.D.Okla. 1976).. 15,17

Stone v. Powell, 428 U.S. 465 (1976) 5, 6,7,8,10,11,13,16

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 14

Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974) 10,15,16

United States v. Calandra, 414 U.S. 338 (1974) 6

Weeks v. United States, 232 U.S. 383 (1914) 8

Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972) 15

Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978) 9,11,15

Womach v. City of St. Joseph, 201 Mo. 467, 100 S.W. 443 (1907) 10

Constitutional Provisions and Statutes Cited

U.S. Const., Amdt. IV 2, 8,9,10,13,15

U.S. Const., Amdt. XIV, §1 3

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1343 4

28 U.S.C. §1738 2,3,11,12

28 U.S.C. §2101 2

42 U.S.C. §1983 ..... 2, 3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Come now Marvin Allen, Steven Jacobsmeyer, and "unknown police officers", Petitioners herein, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on October 1, 1979.

OPINIONS BELOW

The opinion of the District Court, filed on October 13, 1978, is reported at 466 F.Supp. 515 and appears in Appendix A to this Petition, *post*. The opinion of the Court of Appeals, 606 F.2d 795, reversing the judgment of the District Court, is reproduced in Appendix B, *post*. Because the Court of Appeals alludes to matters outside the record on appeal, and for the convenience of this Court, the opinion of the Missouri Court of

Appeals, Eastern District, 587 S.W.2d 337, affirming the conviction of Willie McCurry on state felony charges arising out of matters alleged in his Complaint, is reproduced in Appendix C, *post*.

JURISDICTION

The judgment of the Court of Appeals was filed on October 1, 1979, and this Petition is filed within ninety days of that date. 28 U.S.C. §2101. No rehearing was sought. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a convicted felon is estopped to maintain an action for damages under 42 U.S.C. §1983 on the basis of the same claim of unlawful search and seizure which was raised, fully litigated, and adjudicated adversely to him in a prior state criminal proceeding.

II. Whether persons bringing actions under 42 U.S.C. §1983 are barred by 28 U.S.C. §1738 or by federally formulated rules of collateral estoppel from relitigating constitutional claims (including Fourth Amendment claims) which have been raised, fully litigated, and decided adversely to them in prior state criminal proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The federal judicial code, 62 Stat. 947, 28 U.S.C. §1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Following his state conviction on one count of illegal possession of heroin and two counts of assault with intent to kill with malice aforethought, and while his state appeal was pending (see Appendix B, A-6), Respondent Willie McCurry, pro se, commenced this action in the United States District Court for the Eastern District of Missouri on July 17, 1978. The complaint seeks damages from individual police officers "for the violation of the U.S. Constitutional Rights of the Plaintiff." (Appendix C, A-21.) The complaint has been construed to allege that (1) the police officers (Petitioners herein) conspired to conduct an illegal search of Respondent's home; (2) an illegal search of Respondent's home was carried out; and (3) Respondent was assaulted after being arrested. The action is apparently brought under 42 U.S.C. §§1983, and 1985(3), with federal jurisdiction invoked under 28 U.S.C. §1343. (See Appendix B, A-6; Appendix D.)

Subsequent to the filing of the Complaint, Petitioners moved for dismissal and also for partial summary judgment as to the claim of illegal search. The District Court granted the motion for summary judgment, holding that Respondent was collaterally estopped to litigate the legality of the search because an identical claim had been presented to the state court in the criminal prosecution and the search had been held lawful, although certain items not found in plain view had been suppressed. The District Court also dismissed the remainder of the complaint for reasons not here material.[1]

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[1]Petitioners do not seek review of the judgment of the Court of Appeals insofar as the allegations of assault are concerned.

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court in all respects. Although the Court of Appeals acknowledged that "the search and seizure aspect of his [McCurry's] claim was . . . essentially the same claim that was litigated at the suppression hearing" (Appendix B, A-7), the Court nevertheless concluded that collateral estoppel was not available to the police officers as a defense. The basis for this decision was stated as follows: "We conclude that because of the special role of the federal courts in protecting civil rights . . ., and because habeas corpus is now unavailable to appellant, see *Stone* v. *Powell,* [428 U.S. 465 (1976)], it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's §1983 claims." (Appendix B, A-10 - A-11.) In so holding, the Court of Appeals denied that it was passing on the general question of "whether collateral estoppel applies to §1983 actions when the issues raised in the §1983 suit were determined adversely to the §1983 plaintiff in an underlying state criminal trial." (*Id.,* A-17.)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition Ought To Be Granted Because the Questions of Federal Law Presented Herein Are of Serious National Importance and Must Be Settled By This Court.

A. There is a substantial likelihood that the decision of the Court of Appeals will encourage innumerable state prisoners to seek relitigation of claims of unlawful search and seizure through the medium of §1983 actions, and application of federal rules of collateral estoppel to such actions is necessary to avoid a subversion of Stone v. Powell.

In *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.,* 494 (footnotes omitted). In the course of its opinion, the Court reaffirmed that the exclusionary rule is a judicially created remedy " 'designed to safeguard Fourth Amendment rights generally through its deterrent effect . . .,' " *id.,* 486, quoting *United States* v. *Calandra,* 414 U.S. 338, 348 (1974), and concluded that, in collateral proceedings, the societal costs of the application of the exclusionary rule significantly outweighed the deterrent effect gained thereby. 428 U.S. 491-93. In assessing the societal costs of the rule's application in collateral proceedings, the Court adverted to "serious intrusions on values important to our system of government," including effective utilization of limited judicial resources, the need for finality in criminal actions, minimization of friction between state and federal judicial systems, and the maintenance of the constitutional balance upon which federalism is founded. *Id.,* 491 n. 31.

In this case, the Court of Appeals expressed the concern that, "if collateral estoppel is to apply in §1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution." Appendix B, A-9 - A-10. Accordingly, it proceeded to attempt to assure availability of a federal forum by rejecting application of collateral estoppel to the complaint of unlawful search and seizure in this case.

It does not require clairvoyance to envisage the impact on §1983 litigation by state prisoners if the decision of the Court of Appeals in this case is left undisturbed. State prisoners checked by *Stone* v. *Powell, supra,* from relitigating search and seizure questions in federal court via habeas corpus will flock to the District Courts with pro se complaints modeled on Respondent's herein. Police officers who have seen their actions pronounced lawful by state courts will suddenly find themselves enmeshed in civil litigation in federal courts, with the specter of civil liability for those same actions looming large. In the meantime, what of the policy considerations underlying *Stone* v. *Powell*? The Court of Appeals airily ignored them, as it ignored this Court's clearly expressed idea that state courts can be relied upon to give full and fair consideration to federal constitutional claims. See Appendix B, A-10.

Stone v. *Powell, supra,* must be read as standing for the proposition that rules of federal law fashioned by federal judges ought to be enuniciated with an eye to fostering judicial economy and federal-state comity, without sacrificing the interests of justice. Like the exclusionary rule, res judicata and its corollary collateral estoppel[2] are essentially judge-made rules,

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[2]Petitioners use the term collateral estoppel as denoting rules of "issue preclusion," while res judicata is intended to denote doctrines of "claim preclusion". See generally Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand.L.Rev. 683 (1966).

and are probably more deeply embedded in Anglo-American jurisprudence than the exclusionary rule. See, e.g., *Kingston's (Duchess) Case,* 1 East, P.C. 468, 20 State Trials 355, 168 Eng.Rep. 175 (1776); Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand.L.Rev. 683, 684 notes 5-7 (collecting cases) (1966); compare *Weeks* v. *United States,* 232 U.S. 383 (1914) with *Entick* v. *Carrington,* 19 State Trials 1030 (1765). Many of the considerations underlying res judicata and collateral estoppel - e.g., conservation of judicial time, preservation of respect for the administration of justice, and prevention of harassment of litigants - also underlie the rationale of *Stone* v. *Powell.* Compare 428 U.S. 491 n. 31 with Vestal & Coughenour, *supra,* 19 Vand.L.Rev. 719. Just as the Fourth Amendment does not inherently require relitigation of search and seizure questions in proceedings collateral to the judgment on the merits, see *Stone* v. *Powell, supra,* 428 U.S. 486, neither does the Amendment inherently prohibit the application of collateral estoppel in §1983 actions.

The Court of Appeals in this case seems to hold that the nature of the Fourth Amendment rights protected by 42 U.S.C. §1983 demands that a federal forum be available always to adjudicate alleged violations of those rights and forbids that state judgments on the same issues be given preclusive effect. However, the state courts are obligated to enforce federal law (including the Fourth Amendment) to the same extent as the federal courts, e.g., *Grubb* v. *Public Utilities Comm.,* 281 U.S. 470 (1930); *Robb* v. *Connolly,* 111 U.S. 624, 637 (1884); *P I Enterprises, Inc.* v. *Cataldo,* 457 F.2d 1012 (1st Cir. 1972); *Palma* v. *Powers,* 295 F. Supp. 924 (N.D.Ill. 1969); and it is "a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties." *Frank* v. *Mangum,* 237 U.S. 309, 333 (1915). Moreover, as this

Court itself has remarked in another context, "The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 328 (1971).

So long as the state courts provide an opportunity for full and fair litigation of Fourth Amendment claims, there is no compelling reason to refuse to apply sensible federal rules of collateral estoppel to §1983 actions based on identical claims.[3]

Application of such rules would be fully in accord with the common law of torts which supplies the standards for §1983 actions, see *Pierson* v. *Ray,* 386 U.S. 547 (1967), and many of the Courts of Appeals have so held. E.g., *Winters* v. *Lavine,* 574 F.2d 46 (2d Cir. 1978); *Rimmer* v. *Fayetteville Police Dept.,* 567 F.2d 273 (4th Cir. 1977);*Mastracchio* v. *Ricci,* 498 F.2d 1257 (1st Cir.

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[3]In *Brubaker* v. *King,* 505 F.2d 534 (7th Cir. 1974), it was suggested that collateral estoppel cannot operate to bar a claim of infringement of Fourth Amendment rights under §1983, because the issues in a criminal prosecution and the §1983 action are never the same: "The test . . . under §1983 is not whether the arrest was constitutional or unconstitutional or whether it was with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable." 505 F.2d 536-37 (footnotes omitted). The absurdity of this position is manifest. To recover under §1983, the plaintiff has the burden of proving, inter alia, deprivation of a constitutional right. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 150 (1970); *Rosenberg* v. *Martin,* 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973). If an arrest or search is held constitutional (which is the determination necessarily made in a suppression hearing), then the plaintiff has no claim and the defendant need never establish the defense available to him under *Pierson* v. *Ray, supra.* See *Hunter* v. *Clardy,* 558 F.2d 290 (5th Cir. 1977); *Pritz* v. *Hackett,* 440 F.Supp. 592 (W.D.Wis. 1977); cf. *Rodriguez* v. *Jones,* 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973); *Koger* v. *Guarino,* 412 F.Supp. 1375 (E.D. Pa. 1976), aff'd, 549 F.2d 795 (3d Cir. 1977); *Firnhaber* v. *Sensenbrenner,* 385 F.Supp. 406 (E.D.Wis. 1974).

1974), *cert. denied,* 420 U.S. 909 (1975). Whether Fourth Amendment claims should now be treated differently on account of *Stone* v. *Powell* is a question which only this Court can answer, but the answer is, quite obviously, *no.*

In summary, the decision of the Court of Appeals in this case invites state prisoners to subvert *Stone* v. *Powell* by means of 42 U.S.C. §1983, and raises serious questions about the continued application of rules of collateral estoppel in §1983 actions based on alleged Fourth Amendment violations. "It is for the general welfare that a period be put to litigation." *Womach* v. *City of St. Joseph,* 201 Mo. 467, 100 S.W. 443, 445 (1907); see also *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974) (§1983 was not intended to foster career litigants). This same general welfare, as well as questions of federalism, demands that this Petition be granted and the judgment of the Court of Appeals be reviewed and reversed by this Court.

B. Application of uniform federal rules of collateral estoppel to §1983 actions will assure that meritorious claims receive prompt, effective attention from the federal courts, while protecting law enforcement officers from the harassment and vexation of groundless civil litigation.

Writing in dissent in *Monell* v. *Dept. of Social Services,* 436 U.S. 658, 17 FEP Cases 873 (1978), Mr. Justice Rehnquist referred to "the torrent of civil rights litigation of the last 17 years." 436 U.S. 724, 17 FEP Cases 897. A review of relevant statistics suggests that this description partook of understatement. Filings of civil rights actions in federal district courts during the period 1961 to 1973 grew from 261 to 7,679. *Administrative Office of the United States Courts, 1973 Annual Report* 128. During the fiscal years 1974 through 1978, filings of all types of actions by state prisoners alone grew from 13,423 to 16,969. *Administrative Office of the United States Courts, 1978 Annual*

Report 60. During fiscal 1977 and 1978, while all categories of prisoner filings increased 12.2%, civil rights suits filed by prisoners increased 25.9% to 10,366. *Id.*, 61. Between 1970 and 1978, civil rights complaints filed by state prisoners increased 379.3%, totaling some 9,730 in 1978. *Id.*, 75-76. All prisoner filings multiplied 907.1% between 1960 and 1978, while general civil filings grew a paltry 134.1%. *Id.*, 77.

Petitioners recognize that it is not fashionable these days to advance arguments based on fears of "a flood of litigation." However, Petitioners' arguments herein are not based on fear, but on reality. It cannot be gainsaid that a development which enhances the already monstrous volume of civil rights litigation also enhances the risk that insufficient attention will be given to meritorious claims by judges striving to keep dockets current, in face of a multitude of essentially frivolous claims - especially when both the serious and the frivolous claims are presented in the form of pro se complaints. Such a development is presented by the decision of the Court of Appeals in this case.

The opinion of the Court of Appeals bids fair to substantially increase the volume of civil rights litigation by state prisoners. The Court of Appeals professes to limit its consideration in this case to the *Stone* v. *Powell* situation; but by refusing to give preclusive effect to the state court judgment in this case, it not only undermines *Stone* v. *Powell* but also casts doubt (for the Eighth Circuit, at least) on the continued application of rules of collateral estoppel in §1983 actions generally, regardless of the underlying constitutional claim. See Appendix B, A-6 to A-12.

As illustrated, for example, by *Winters* v. *Lavine, supra*[4] the

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[4] *Winters* also addressed the application of 28 U.S.C. §1738 to actions under §1983, and concluded that both the statute and general rules of collateral estoppel barred the action there considered. 574 F.2d at 54-55. Petitioners assert that 28 U.S.C. §1738 can and should

application of a federal rule of collateral estoppel in §1983 actions will ensure that meritorious claims will receive full attention from the federal courts, while at the same time permitting early and economical resolution of baseless claims. State criminal defendants will be foreclosed from relitigating constitutional claims via §1983 only to the extent that they have actually litigated those claims without success in state court. Where criminal defendants prevail in state court (or where their constitutional claims are not reached), they will be free to litigate their claims in federal court. See, e.g., *Palma* v. *Powers, supra,* 295 F.Supp. at 942 (defendant who was acquitted in state prosecution held entitled to maintain §1983 action based on unlawful search; convicted co-defendant held barred); cf. *Fernandez* v. *Trias Monge,* 586 F.2d 848 (1st Cir. 1978) (no state ruling on the merits of constitutional claim). Thus, the state courts will be utilized as a screening mechanism, with resulting benefits to §1983 plaintiffs and defendants alike.[5]

C. The continued application of the exclusionary rule in criminal prosecutions compels the application of a federal rule of collateral estoppel to §1983 actions based on searches and seizures.

The operation of the exclusionary rule in criminal cases has occasioned considerable dissatisfaction and criticism. See, e.g.,

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be applied to §1983 actions when a state judgment is called in question, and §1738 provides an additional reason for giving the state judgment preclusive effect in this case, since Respondent McCurry's criminal conviction would work an estoppel under Missouri law. E.g., *LaRose* v. *Casey,* 570 S.W.2d 746 (Mo.App. 1978).

[5]Where state criminal defendants prevail on their constitutional claims in state court, the defendants will, of course, retain the right to assert their good faith-reasonable belief defense under *Pierson* v. *Ray,* supra.

California v. *Minjares*, ____ U.S. ____, 100 S.Ct. 9 (1979) (Rehnquist, J., dissenting from denial of stay); *Stone* v. *Powell*, *supra*, 428 U.S. 496-502 (Burger, C.J., concurring), 536, 541-42 (White, J., dissenting). The rule is now perceived not as a personal constitutional right, but as a judge-made rule intended to deter conduct which violates the Fourth Amendment. *Stone*, *supra*, 428 U.S. at 486. A sense that the rule is inadequate to protect Fourth Amendment rights has led this Court to infer a damage remedy from the Amendment itself. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Of course, esentially the same remedy is provided by 42 U.S.C. §1983. See. e.g., *Brubaker* v. *King*, *supra*, 505 F.2d. at 536-37.

Even though the exclusionary rule is not a constitutional rule, its application necessarily involves an extensive examination of the constitutionality of the search and seizure involved; only when the search is unconstitutional need the rule be applied. E.g., *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Consequently, the continued imposition of the exclusionary rule on the states guarantees that cases such as Respondent's herein will continue to plague the federal courts, with a deleterious effect on law enforcement. The officer who conducts a search will be faced with the prospect that even if the state courts uphold him, he may nevertheless be mulcted in damages by the convicted defendant. On the other hand, if the constable blunders, not only will the criminal go free, but he will perhaps stand to be compensated by the hapless constable. Society will be left with freed felons and intimidated law enforcement personnel - the worst of both worlds.

Were the exclusionary rule abandoned, the focus of litigation concerning search and seizure would shift entirely to the civil forum, and it is probable that 42 U.S.C. §1983 and *Bivens*, *supra*, would provide a superior means of vindicating Fourth

Amendment rights than the exclusion of illegally seized evidence in criminal prosecutions.[6] Until that happy day, however, it is important to shield law enforcement officers from unnecessary litigation. The application of rules of collateral estoppel would do so to a large extent. By giving preclusive effect in §1983 cases to state court judgments on search and seizure questions, the federal courts would at least assure law enforcement officers that they will have to litigate civil actions only when there is a real question as to the validity of their conduct. While this would not obviate the anomalous result of dual benefit to patently guilty individuals, who are set free because of the exclusionary rule and then seek damages, it would eliminate the even more absurd result (rendered possible by the Court of Appeals' opinion in this case) that a convicted felon may obtain damages on account of police actions which led to his conviction.[7]

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[6]In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), this Court enunciated a doctrine of federal common law based on §301 of the Labor Management Relations Act, 29 U.S.C. §185. Drawing on, but not controlled by, the common law or state law of contracts, the federal courts have proceeded to create a body of federal law relating to what are essentially federal rights, i.e., collective bargaining rights and obligations.

Like §301, L.M.R.A., §1983 has also been construed to create a special federal remedy to protect and vindicate federal rights. E.g., *Monroe* v. *Pape,* 365 U.S. 167 (1961). The law to be applied is federal law, but the corpus of that federal law is drawn from the common law of tort. See *Pierson* v. *Ray, supra.* Although this Court has not expressly said so, it is evident that 42 U.S.C. §1983 can and should be construed as authorizing "federal courts to fashion a body of federal law for the enforcement" of federal constitutional rights. See *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. 451. If §1983 is so construed, the reason for the exclusionary rule passes away.

[7]It is sometimes argued that application of collateral estoppel in §1983 actions would unfairly restrict a person's choice of forum in which to litigate a federal claim. See generally, Theis, Res Judicata in

II. The Petition Ought To Be Granted Because the Decision of the Court of Appeals Is in Direct Conflict With the Overwhelming Weight of Authority in the Other Circuits.

As this Court remarked in *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973), "res judicata has been held to be fully applicable to a civil rights action brought under §1983." An examination of the authorities fully supports that view. Nearly every federal court addressing the issue has held that principles of res judicata and collateral estoppel apply in §1983 actions, and that prior state civil *and criminal* judgments will be given preclusive effect in accordance with those principles, even when the issues involved are constitutional issues. *Martin* v. *Delcambre,* 578 F.2d 1164 (5th Cir. 1978); *Winters* v. *Lavine, supra; Rimmer* v. *Fayetteville Police Dept., supra; Mastracchio* v. *Ricci,* supra; *Thistlethwaite* v. *City of New York, supra; Brazzell* v. *Adams,* 493 F.2d 489 (5th Cir. 1974); *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1970); *Kauffman* v. *Moss,* 420 F.2d 1270 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970); compare *Brubaker* v. *King, supra,* with *Williams* v. *Liberty,* 461 F.2d 325 (7th Cir. 1972); compare *Mulligan* v. *Schlachter,* 389 F.2d 231 (6th Cir. 1968) with *Curtis* v. *Tower,* 262 F.2d 166 (6th Cir. 1959); but see *Ney* v. *California,* 439 F.2d 1285 (9th Cir. 1971).

The Court of Appeals in this case was fully aware of the weight of authority, see Appendix B, A-7 - A-9. Nevertheless, the Court chose to ignore the overwhelming majority of cases and proceed to reject the application of collateral estoppel in this

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Civil Rights Act Cases: An Introduction to the Problem, 70 Nw.L.Rev. 859, 872-73 (1970). However, this argument is chimerical. The argument's underlying assumption is that state court defendants will always fail to successfully assert a Fourth Amendment violation. That assumption is manifestly false. Moreover, the critical question should be whether the claim is meritorious, not where it may be asserted. If there has been full and fair litigation of the issue, then there is no reason for an encore in another court, simply because it is a federal court. See, e.g., *Palma* v. *Powers, supra,* 295 F.Supp. 924, 937; see also *Smith* v. *Sinclair,* 424 F.Supp. 1108 (W.D.Okla. 1976).

case. In doing so, the Court of Appeals attempted to distinguish many of the cases on the ground that their rationale for applying collateral estoppel rested on the availability of federal habeas corpus, and were, therefore, emasculated (in search and seizure cases) by *Stone* v. *Powell.* In a few cases, this could be true. See, e.g., *Rimmer* v. *Fayetteville Police Dept., supra,* 567 F.2d at 276. In most of the cases, however, the availability of habeas corpus was neither discussed nor relied on, or was at most an alternative justification. E.g., *Mastracchio* v. *Ricci, supra; Thistlethwaite* v. *City of New York, supra* (alternative justification); *Metros* v. *United States District Court, supra.*

The Court of Appeals also felt justified in ignoring the weight of authority on the ground that the decisions expressly applying collateral estoppel in §1983 actions alleging unlawful search and seizure were decided prior to *Stone* v. *Powell.*

Whatever one may think of the Court of Appeals' view of the impact of *Stone* v. *Powell* on §1983 actions, it cannot be denied that the decision in this case squarely conflicts with *Metros* v. *United States District Court, supra.* In *Metros,* the Court of Appeals for the Tenth Circuit explicitly held that an application of rules of "issue preclusion" prevented the relitigation in a §1983 action of the validity of a search warrant issued by a state court.[8] In so holding, the Court of Appeals for the Tenth Circuit did not rely on the availability of habeas corpus, but rather solely on the traditional grounds for applying preclusion principles generally. 441 F.2d 316-17.

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[8]Generally, the standard for determining if litigation of a question in a civil suit is barred by a prior criminal conviction is whether the question was distinctly put in issue and directly determined in the prior criminal proceeding. E.g., *Kauffman* v. *Moss, supra,* 420 F.2d 1274. In *Metros, supra,* a state search warrant had been obtained, and the Court noted that, for collateral estoppel purposes, this unchallenged warrant constituted a prior judicial determination of the legality of the search. The defendant *could* have attacked the warrant by a motion to

The opinion of the Court of Appeals in this case is, therefore, not only a departure from settled principles of law under §1983, but also squarely conflicts with decisions of the Court of Appeals for the Tenth Circuit, *Metros, supra,* and also for the Fifth Circuit, see *Meadows* v. *Evans,* 550 F.2d 345, 351 (5th Cir. banc), *cert. denied,* 434 U.S. 969 (1977) (separate opinion of Tjoflat, Circuit Judge, citing *Shank* v. *Spruill,* 406 F.2d 756 (5th Cir. 1969) and *Jones* v. *Bales,* 58 F.R.D. 453 (M.D.Ga. 1972), *aff'd,* 480 F.2d 805 (5th Cir. 1973)). See also *Smith* v. *Sinclair,* supra, and *Palma* v. *Powers,* supra. This conflict should be resolved by this Court by reviewing and reversing the Court of Appeals in this case.

III. The Petition Ought To Be Granted Because the Questions Presented Herein Have Been Decided By the Court of Appeals For the Eighth Circuit in a Manner Which Conflicts With Other Decisions of That Court and Also With Decisions of the Supreme Court.

Prior to the decision in this case, it could have been averred with some confidence that the Court of Appeals for the Eighth Circuit adhered to the generally accepted rule that collateral estoppel applies to §1983 actions and operates as a bar to the relitigation of constitutional issues which were or could have been raised in a prior state court action. *Robbins* v. *District Court of Worth City,* 592 F.2d 1015 (8th Cir. 1979); *Goodrich* v. *Supreme Court of South Dakota,* 511 F.2d 316 (8th Cir. 1975); *Jenson* v. *Olsen,* 353 F.2d 825 (8th Cir. 1965); *Norwood* v. *Parenteau,* 228 F.2d 148 (8th Cir. 1955), *cert. denied,* 351

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suppress, but he did not, choosing instead to plead guilty. Hence, collateral estoppel applied. Whether a different rule should obtain in §1983 actions based on a warrantless search, when the defendant has pleaded guilty (since the validity of the search presumably need not be considered essential to the result, compare *Brazzell* v. *Adams, supra*), is not a relevant question in this case, since Respondent McCurry did not plead guilty and did, in fact, fully litigate the validity of the search.

U.S. 955 (1956). However, in its zeal to reach what it conceived to be a desirable result in this case, the Court has distinguished the foregoing cases on very flimsy grounds and has ignored others, so that it is clear that the Court was seeking to reopen the entire question of collateral estoppel in §1983 cases for the future.

The opinion in this case asserts that the Court of Appeals for the Eighth Circuit has never addressed the issue of whether collateral estoppel applies to §1983 actions when the issues raised by the §1983 plaintiff have been determined adversely to him in an underlying state criminal proceeding. Appendix B, A-6 to A-9. The opinion purports to distinguish *Robbins, Goodrich* and *Jenson,* all *supra,* primarily on the basis that the underlying state proceedings were civil. In so doing, the Court overlooked its statement in *McNally* v. *Pulitzer Pub. Co.,* 532 F.2d 69 (8th Cir.), *cert. denied,* 429 U.S. 855 (1976): "It is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was 'distinctly put in issue and directly determined' in the criminal action." 532 F.2d at 76, citing, inter alia, *Kauffman* v. *Moss, supra,* a case involving an underlying state criminal action. The Court also failed to sufficiently explain the nature of its application of collateral estoppel in *Goodrich,* supra, in which a §1983 plaintiff was precluded from relitigating issues decided in his disbarment proceeding, which the Court characterized as "quasi-criminal". 511 F.2d at 318 n. 4.

Of course, the inconsistency manifested by the Eighth Circuit in dealing with collateral estoppel in §1983 actions might not of itself warrant grant of certiorari, but for the fact that the Court of Appeals' latest inconsistency has led itself into conflict with decisions of the Supreme Court.

This Court has consistently held that issues decided in a criminal conviction may work an estoppel in a subsequent civil

proceeding, and that a state court decision of a federal question may be accorded preclusive effect. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951); *Sealfon* v. *United States*, 332 U.S. 575 (1948); *Grubb* v. *Public Utilities Comm., supra; Frank Mangum, supra;* cf. *Robb* v. *Connolly, supra.* The precise question in *Emich* involved §5 of the Clayton Act, 15 U.S.C. §16, and the use of criminal antitrust convictions as evidence in subsequent civil proceedings; but the decision in the case was made by referring to the general doctrine of collateral estoppel, *supra,* 340 U.S. at 568, and the case has been frequently cited as the source for collateral estoppel principles to be applied in §1983 actions. See, e.g., *Kauffman* v. *Moss, supra,* 420 F.2d at 1274. More recently, this Court has expressed itself in favor of limiting litigants to one full and fair opportunity to litigate an issue, *Blonder-Tongue, Laboratories, Inc.* v. *University of Illinois Foundation, supra,* and has explicitly recognized that res judicata has been held fully applicable to §1983 actions, *Preiser* v. *Rodriguez, supra;* but see *Ellis* v. *Dyson,* 421 U.S. 426, 440 (1975) (Powell, J., dissenting).

Thus, not only is the decision of the Court of Appeals in this case at war with other precedents of the same Circuit, it is also clearly at variance with the principles of collateral estoppel heretofore adopted and recognized by this Court to be applicable to §1983 actions. Compare *Emich Motor Corp.* v. *General Motors Corp., supra,* with *Preiser* v. *Rodriguez, supra.* The Court of Appeals for the Eighth Circuit should be corrected by means of granting this Petition and reversing the judgment below.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals of the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Willie McCurry,

Plaintiff,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

JUDGMENT

(Filed October 13, 1978)

A memorandum dated this day is hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants motion for summary judgment be and is sustained. Plaintiff's complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment be and is denied.

Dated this 13th day of October, 1978.

/s/ J. H. Meredith
United States District Judge

Willie McCurry,

Plaintiffs,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

MEMORANDUM

(Filed October 13, 1978)

This matter is before the Court on the motion of defendant St. Louis Police Department to dismiss for failure to state a claim, on the motion of defendants for summary judgment, and on the motion of plaintiff for summary judgment. For the reasons stated below, the Court will grant defendants' motion for summary judgment and dismiss plaintiff's complaint with prejudice.

This pro se action is brought under 42 U.S.C. 1983. Plaintiff alleges that on April 9, 1977, various police officers of the St. Louis Police Department conducted an illegal and unconstitutional search of his house following his arrest.

It appears from the police reports that defendants Jacobsmeyer and Allen went to plaintiff's home to make a purchase of heroin and knocked on the door. Plaintiff opened the front door and, after being asked to sell the undercover agents heroin, said "wait a minute, I'll get it". After a brief period of time plaintiff returned and shot both defendants, wounding them seriously.

Plaintiff was tried and convicted in St. Louis County Circuit Court of assault with intent to kill, Cause No. 77-862. Plaintiff then filed this action seeking $1,000,000.00 in damages for a "deliberate and intentional violation of the U.S. Constitutional Rights of the Plaintiff."

Plaintiff contends that a search that was conducted after the shooting by "unknown police officers" and officers Jacobsmeyer and Allen, both of whom were lying on the ground critically wounded, violated his right to protection from unlawful searches under the Fourth Amendment of the United States Constitution.

Defendants move for summary judgment on the grounds that the lawfulness of the search was litigated at the state level and is therefore barred from relitigation by res judicata.

It should first be noted that res judicata does not apply in this instance because different parties are involved. Rather, collateral estoppel will bar relitigation of only those issues which were actually litigated on the merits in the first action.

In support of the motion for summary judgment, defendants attach a copy of the Court's ruling on plaintiff's motion to suppress all evidence obtained from the alleged unlawful search. It reveals that the Court upheld the search of the house insofar as evidence in plain view was seized. The Court did suppress evidence (heroin) which was taken from a search of some dresser drawers. Nevertheless, the impact of that decision is that the police lawfully entered the house pursuant to a lawful arrest and lawfully searched the house for evidence.

This Court will grant defendants' motion on the ground that the only issue in the instant lawsuit—whether the entrance into plaintiff's home and the resulting search was lawful—was litigated on the merits at his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search. *Rodriguez* v. *Beam,* 423 F. Supp. 906, 908 (S.D.N.Y. 1976), *Taylor* v. *New York City Transit Authority,* 433 F.2d 665 (2d Cir. 1970). Since no genuine issues remain for trial, and it is further evident that defendants are entitled to judgment as a matter of law, Rule 56(c), Fed. R. Civ. Proc., the motion will be granted and plaintiff's complaint dismissed. This ruling will obviously moot plaintiff's motion for summary judgment.

Dated this 13th day of October, 1978.

/s/ J. H. Meredith
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 78-1849

Willie, McCurry,

Appellant.

v.

Marvin Allen, Steven Jacobsmeyer, and Unknown Police Officers, St. Louis Police Department, St. Louis, Missouri,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: April 19, 1979

Filed: October 1, 1979

Before LAY, HEANEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Willie McCurry appeals from a judgment of the district court granting appellees' motion for partial summary judgment and dismissing with prejudice appellant's entire § 1983 civil rights complaint. 42 U.S.C. § 1983. Appellant was convicted of illegal possession and assault with intent to kill in state court pro-

ceedings. Subsequently, appellant filed a § 1983 action alleging violation of his constitutional rights in connection with his arrest and naming as defendants two individual police officers, "unknown police officers," and the City of St. Louis Police Department. The district court granted the motion for summary judgment on the basis of collateral estoppel.

For reversal appellant argues that the trial court erred in applying the doctrine of collateral estoppel to bar appellant's § 1983 action and in dismissing with prejudice appellant's entire § 1983 complaint. For the reasons discussed below, we reserve the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

On April 9, 1977, six or seven undercover police officers went to appellant's house on an informant's tip that appellant was currently selling heroin. Two officers were to make a heroin purchase while the other officers remained secluded in nearby bushes. The two officers knocked on the front door of appellant's home, and, when appellant came to the door, asked if he had some "caps" (capsules of heroin) they could purchase. Appellant said, "Wait a minute," or something to that effect, and came back shooting. The two officers standing at the door were seriously wounded. The other officers opened fire and a gun battle ensued. Additional officers arrived until there were about thirty-five officers at the scene. After all officers had arrived, one of the officers announced with a bullhorn, "We are police, let us in," and "Come out of the house, no action will be taken." Appellant and his father then came out of the house. The officers, suspecting that there were additional persons within, rushed into the house to check. Some time thereafter, exactly when is not clear from the record, Officer Brand, who had been designated as the "seizing officer," entered the house and found the items which are the subject of the search appellant argues in unconstitutional.

Before trial appellant made a motion to suppress the evidence discovered during the search. After the suppression hearing, the state trial court granted appellant's motion in part by suppressing the evidence found in drawers and "among tire." The court denied the motion as to evidence found in plain view.

At trial appellant was found guilty on one count of illegal possession of heroin and on two counts of assault with intent to kill with malice aforethought. *State* v. *McCurry,* No. 77-862 (Mo. Cir. Ct. Jan. 6, 1978), *aff'd,* No. 39-999 (Mo. Ct. App. Aug. 14, 1979).

On July 7, 1978, appellant filed a § 1983 claim for $1,000,000 in damages against individual police officers based on the following alleged violations of his constitutional rights: (1) the police officers conspired to conduct an illegal search of his home, (2) his home was illegally searched, and (3) he was assaulted by police officers upon being arrested.[1] The district court granted defendants' motion for summary judgment on the ground that:

> the only issue in the instant lawsuit—whether the entrance into plaintiff's home and the resulting search was lawful—was litigated on the merits at his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search.

McCurry v. *Allen,* No. 78-717C(1) (E.D. Mo. Oct. 13, 1978). This appeal followed.

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[1]We note that appellant learned the name of the police officer who allegedly assaulted him subsequent to the filing of the § 1983 action. Appellant should be granted leave to amend his complaint in this respect.

> In passing upon a motion for summary judgment the court is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings, depositions and affidavits filed in the case.

EEOC v. *Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978) (citations omitted).

We find that the district court was erroneous in granting the motion for summary judgment. The district court improperly held that the *only* issue in the case was the allegedly unconstitutional search and seizure. In addition to his search and seizure claim, appellant also alleged that he had been assaulted by police officers upon arrest. From the district court's memorandum, it is apparent that the district court overlooked this serious allegation. Upon remand the district court should give the assault and conspiracy claim appropriate consideration. Further, the district court ultimately granted appellee's § 1983 action was barred by collateral estoppel. When appellant filed his § 1983 action seeking damages for the violation of his civil rights, the search and seizure aspect of his claim was, as we acknowledge, essentially the same claim that was litigated at the suppression hearing. Unlike the district court, however, we do not believe that this requires the conclusion that appellant's § 1983 claim is barred by collateral estoppel.

Numerous courts have addressed the general question whether collateral estoppel applied to § 1983 actions when the issues raised in the § 1983 suit were determined adversely to the § 1983 plaintiff in an underlying state criminal trial. The First,[2]

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[2] *Fernandez* v. *Trias Monge*, 586 F.2d 848, 854 (1st Cir. 1978); *Mastracchio* v. *Ricci*, 498 F.2d 1257, 1260 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

Second,[3] Third,[4] Fourth,[5] Fifth,[6] Sixth,[7] and Tenth[8] Circuits, as well as numerous district courts,[9] have held that collateral estoppel is appropriately applied in such circumstances. This circuit has not yet addressed this issue[10] and we do not do so now.

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[3] *Winters* v. *Lavine,* 574 F.2d 46, 58 (2d Cir. 1978); *Turco* v. *Monroe County Bar Ass'n,* 434 U.S. 834 (1977); *Thistlethwaite* v. *City of New York,* 497 F.2d 339, 341-43 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974).

[4] *Kauffman* v. *Moss,* 420 F.2d 1270, 1274 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970).

[5] *Wiggins* v. *Murphy,* 576 F.2d 572, 573 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 874 (1979); *Rimmer* v. *Fayetteville Police Dep't,* 567 F.2d 273, 276 (4th Cir. 1977); *Moye* v. *City of Raleigh,* 503 F.2d 631, 634 (4th Cir. 1974).

[6] *Martin* v. *Delcambre,* 578 F.2d 1164, 1165 (5th Cir. 1978); *Meadown* v. *Evans,* 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc,* 550 F.2d 345, *cert denied,* 434 U.S. 969 (1977); *Brazzell* v. *Adams,* 493 F.2d 489, 490 (5th Cir. 1974).

[7] *Mulligan* v. *Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968).

[8] *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1971).

[9] *See, e.g., Olitt* v. *Murphy,* 453 F. Supp. 354, 358-60 (S.D.N.Y.), *aff'd without opinion,* 591 F.2d 1331 (2d Cir. 1978); *Hammer* v. *Town of Greenburgh,* 440 F. Supp. 27, 29 (S.D.N.Y. 1977), *aff'd without opinion,* 578 F.2d 1368 (2d Cir. 1978); *Smith* v. *Sinclair,* 424 F. Supp. 1108, 1111-12 (W.D. Okla. 1976); *Rodriquez* v. *Beame,* 423 F. Supp. 906, 908 (S.D.N.Y 1976); *Moran* v. *Mitchell,* 354 F. Supp. 86, 88-89 (E.D. Va. 1973). *But see generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 VA. L. REV. 250 (1974); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 NW. L. REV. 859 (1976); *Developments in the Law-Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977).

[10] In *Jenson* v. *Olson,* 353 F.2d 821 (8th Cir. 1965), this court applied preclusion principles in a federal civil rights action, but only to

A more specific issue, and one which is complicated by unusual circumstances, is presented in this case. The specific issue is whether appellant's § 1983 claim raising search and seizure questions is barred by collateral estoppel; the unusual circumstance is that since 1976, search and seizure claims, except in a few situations, can no longer be raised by state prisoners in federal habeas corpus actions. Thus, if collateral

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bar relitigation of a purely factual matter; the federal court considered fully the plaintiff's constitutional claims. Recently this court has applied preclusion principles to constitutional claims previously litigated in state courts but the underlying state proceedings were civil. *See Robbins* v. *District Court,* 592 F.2d 1015 (8th Cir. 1979) (termination of parental rights); *Goodrich* v. *Supreme Court,* 511 F.2d 316 (8th Cir. 1975) (disbarment proceedings). Thus we have not yet addressed the particular problems which arise when the prior state proceeding was criminal and the constitutional rights at stake are fourth amendment rights.

The Seventh and Ninth Circuits have not yet addressed this issue directly. The Ninth Circuit, in *Ney* v. *California,* 439 F.2d 1285 (9th Cir. 1971), found it unnecessary to decide if collateral estoppel applies, in general, to § 1983 actions because it found the elements of collateral estoppel (referred to as res judicata by the Ninth Circuit) were not met (the issue raised in the § 1983 claim was not raised at the state court proceedings). In dicta, however, the Court stated that applying res judicata to federal civil rights actions would render the Civil Rights Acts a "dead letter." *Id.* at 1288. The Ninth Circuit has apparently not addressed the issue since 1971.

The Seventh Circuit's position is initially appealing. In *Brubaker* v. *King,* 505 F.2d 534, 536-37 (7th Cir. 1974), the Court held that the issue to be considered at a suppression hearing in a state criminal trial (the constitutionality of the search) was not the same issue (good faith and reasonable belief the search was with probable cause) presented in a § 1983 suit against police for damages. Therefore, the Seventh Circuit held collateral estoppel could not, by definition, apply to § 1983 actions in which the underlying issues had previously been litigated in state trial courts. The problem we see with this analysis is that it would be very difficult, practically speaking, for a federal court to subsequently hold in a § 1983 claim that officers were *not* acting in good faith or with "reasonable belief" if the state court has already held the search to be constitutional.

estoppel is to apply in § 1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution.

Of the seven circuits which have held that collateral estoppel is applicable to § 1983 actions, only two were confronted with § 1983 actions which raised search and seizure claims, and both of these courts considered this issue before *Stone* v. *Powell,* 428 U.S. 465 (1976), when federal habaes corpus relief became unavailable. *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1971); *Mulligan* v. *Schlachter,* 389 F.2d 231 (6th Cir. 1968). Moreover, many of the courts which concluded that collateral estoppel should apply to § 1983 actions expressly based their holding on the fact that federal habeas corpus relief, and thus a federal forum, was then available. *Rimmer* v. *Fayetteville Police Department,* 567 F.2d 273, 276 (4th Cir. 1977); *Thistlethwaite* v. *City of New York,* 497 F.2d 339, 343 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974); *Alexander* v. *Emerson,* 489 F.2d 285, 286 (5th Cir. 1973) (per curiam); *Moran* v. *Mitchell,* 354 F. Supp. 86 (E.D. Va. 1973); *cf. Fernandez* v. *Trias Monge,* 586 F.2d 848 (1st Cir. 1978) (commonwealth supreme court denial of certiorari in juvenile court proceedings imported no view on merits of case). Chief Justice Burger in his concurring opinion in *Stone* v. *Powell* partially justified rendering habeas corpus unavailable as a remedy for fourth amendment claims on the basis that alternative remedies were still available. 428 U.S. at 500-01. A § 1983 damage action is clearly one of the more obvious of such alternative remedies.

We conclude that because of the special role of federal courts in protecting civil rights, *e.g., Mitchum* v. *Foster,* 407 U.S. 225, 242 (1972) (federal courts as guardians of the people's federal rights); *but cf. Stone* v. *Powell, supra,* 428 U.S. at 493-94 n.35 ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitu-

tional rights in the trial and appellate courts of the several States."), and because habeas corpus is now unavailable to appellant, *see Stone* v. *Powell, supra,* 428 U.S. at 492-94 & n.37, it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims.

Nonetheless, although we are not collaterally estopped by the judgment of the Missouri courts on appellant's fourth amendment claim, we believe it appropriate to temporarily abstain until the Missouri courts have had the opportunity to directly review appellant's conviction and the underlying search of his home. It is clear that if appellant was seeking injunctive or declaratory relief, we would have no choice but to abstain until the state criminal proceedings had run their course. *Juidice* v. *Vail,* 430 U.S. 327, 333-36 (1977); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 604-07 (1975); *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). Whether abstention is also mandatory when only damages are sought in an § 1983 action has been explicitly left open by the Supreme Court. *Juidice* v. *Vail, supra,* 430 U.S. at 399 n.16. In deference to the state courts, however, we believe it appropriate to abstain under the present circumstances as well.

Therefore the district court's order granting summary judgment for defendants-appellees is reversed and the district court is ordered to stay appellant's § 1983 action in order to prevent the tolling of the statute of limitations pending the Missouri courts' review of appellant's conviction. We realize that by abstaining we are refusing appellant immediate relief and committing him to perhaps several years of litigating his § 1983 claim, which appears, from the record before us, to be serious and substantial. This is most unfortunate[11] but it is the price ex-

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[11] "This case dramatically diagrams the pitfalls that snare or nearly snare litigants and courts alike when a constitutional claim is brought in federal courts that involves an ongoing state prosecution." *Fernandez* v. *Trias Monge, supra,* 586 F.2d at 849; *cf. Trainor* v. *Hernandez,* 431 U.S. 434, 470 (1977) (Stevens, J., dissenting) (characterizing the Supreme Court's abstention doctrine as "increasingly Daedalian").

acted by our federal-state court system. *See Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 607, *citing Younger* v. *Harris, supra,* 401 U.S. at 44.

For the foregoing reasons the order of the district court is reversed and remanded for further proceedings as directed herein.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

In the Missouri Court of Appeals
Eastern District
Division One

State of Missouri, Respondent, vs. Willie McCurry, Appellant.	No. 39999 Appeal from the Circuit Court City of St. Louis Hon. Harold L. Satz, Judge Opinion Filed: August 14, 1979

Defendant appeals from his conviction by a jury of two counts of assault with intent to kill with malice aforethought and one count of possession of a controlled substance—heroin. The court, acting pursuant to the second offender act, sentenced defendant to two thirty year consecutive terms on the assaults and a concurrent ten year term on the heroin charge. We affirm.

At 10:30 p.m. on April 9, 1977, several policemen from the Tactical Anti-Crime Team (TACT) of the St. Louis Police Department went to a home on North Market in St. Louis. Their intention was to make a purchase of narcotics at that location and then arrest the seller. Two officers, Jacobsmeyer and Allen, went up to the door of the premises and knocked. The remaining officers secreted themselves at the rear of the house and near the front door. Defendant opened the door and Allen said they had been sent by Victor Murphy and wanted to buy "two caps" or "two buttons"—referring to heroin. Defendant responded that they should wait while he got what they wanted. Defendant then left the doorway closing the door until it was slightly ajar. Jacobsmeyer and Allen signalled to the nearby police officers who moved closer to the doorway but still attempted to remain concealed. All of the police officers were

dressed in casual clothing although all of them except Jacobsmeyer and Allen wore armbands and caps identifying them as members of TACT. Approximately thirty seconds after leaving the doorway, defendant returned and began firing at Jacobsmeyer and Allen. Both were hit. The other police then began firing into the house and were shortly joined by a large number of uniformed police responding to a radio call for assistance. Many of these officers also began firing into the house. After five or ten minutes the police ceased firing upon orders from one of their number and by loudspeaker accouncement the occupants of the house were advised that the house was surrounded by police and the occupants should surrender. Defendant and his father then left the house, unarmed, and were arrested. Upon a search of the house heroin was discovered on a dresser top in a bedroom. A pistol from which the bullet which hit Jacobsmeyer was discharged was found and a shotgun was also found.

Defendant contended that he believed the men at the door were burglars trying to force their way into his house, that he removed a pistol from his back pocket and fired at them and that he would not have done so had he realized they were police officers.

On appeal defendant raises three points. His first is that certain evidence seized from his home was inadmissible because obtained in contravention of his rights under the Fourth and Fourteenth Amendments. Following the exit of defendant and his father from the house several police officers entered the premises to search for additional persons therein. One of the officers who entered was Detective Brand who had been designated by the officer in charge of the TACT operation, Sgt. Hammer, as the "seizure officer." Defendant contends that Brand did not enter the house until an hour after the arrest of defendant and after the house had been searched for additional persons with no success. We do not find that the record sup-

ports such a contention. Brand was instructed to enter the house by Hammer and Hammer left the scene to go to the hospital to see Jacobsmeyer and Allen immediately after defendant exited the house. Although the record does not indicate precisely when Brand entered the house, it is reasonable to conclude that it was shortly after he was instructed to do so and while other officers were also inside looking for other occupants. The search for occupants continued for approximately an hour after original entry, in part because of difficulty in obtaining access to a portion of the house which was locked. In going through the house Brand found heroin, a strainer and spoon with heroin residue on them on top of a dresser in a bedroom. Other officers searching for occupants found the pistol and shotgun. All of these items were in plain view. Additionally, Brand found additional contraband in dresser drawers and hidden in some tires on a porch. Those items were not in plain view. After hearing on defendant's motion to suppress, the trial court sustained the motion as to those items found in drawers and the tires and denied the motion as to those items in plain view.

The thrust of defendant's point is that Brand's entry into the house was not under emergency circumstances and that the search conducted was not reasonable in time, spatial scope or intensity.

The general rule is that warrantless searches are unreasonable *per se* unless the action falls within certain delineated exceptions. State v. Epperson, 571 S.W.2d 260 (Mo. banc 1978). The burden of proof is upon the state to establish that an exception exists. Objective facts within the knowledge of police and reasonable conclusions objectively drawn therefrom are determinative of the reasonableness of the particular search. Terry v. Ohio, 392 U.S. 1 (1968). "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted." Bell v. Wolfish, ____ U.S. ____ (May 14, 1979).

Defendant concedes, and we also find, that the entry of the police into the house following defendant's exit therefrom was justified under the emergency circumstances then existing. At that time the police did not know how many persons had been shooting from the house, whether additional persons were still in the house and posed a danger, and whether someone might be injured inside the house. Where the basic intrusion is justified because of an emergency the seizure of items in plain view is permissible during the continuation of the emergency and so long as the search and seizure is reasonable in time, spatial scope and intensity. State v. Epperson, 571 S.W.2d 260 (Mo. banc 1978); Michigan v. Tyler, 436 U.S. 499 (1978); Mincey v. Arizona, 437 U.S. 385 (1978).

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Coolidge v. New Hampshire, 403 U.S. 443 (1971), l.c. 466.

Two weapons which were in plain view and seized by police officers who were searching for other occupants of the house clearly met all the requirements of admissibility. Defendant contends that the heroin and related paraphernalia found on the dresser top by Officer Brand does not meet the admissibility criteria because Brand's function was not to search for suspects but for evidence or contraband. As previously stated we do not find record support for defendant's contention that Brand entered the house after the emergency had terminated. That Brand stated he believed there were no other occupants present in the house when he entered does not mean there were none. The record supports the conclusion that when Brand entered other officers were still searching for additional occupants. The nature of the search for suspects made all portions of the house capable of containing a person a legitimate area of search. The officers conducting the search were therefore entitled to seize

any evidence in plain view within an area of the house capable of concealing a person.

The question then presented is whether the seizure of items in plain view must be made by the officers coping with the emergency itself or may it be made by an officer whose function it is to seize evidence. The cases which have dealt with "plain view" searches and seizures have referred to the justification for the original intrusion by the police and have not dealt with the specific function of the seizing officer although seizures by officers not engaged in actually coping with the emergency have been upheld. *See* Michigan v. Tyler, *supra;* State v. Epperson, *supra.* Nor is it reasonable to limit seizure to those officers coping with the emergency when the emergency is one imposing danger or a need for quick action on those officers. Here the officers who were searching the house for additional occupants could clearly have seized the heroin in plain view on the dresser. But seizure of evidence requires, as a practical matter, considerable care and time. The requirements of care to avoid contamination and destruction of fingerprints and the time necessary to properly identify and mark the evidence to preserve its admissibility in court cannot practically be accomplished by officers dealing directly with an emergency involving a wounded person or a situation requiring vigilance to avoid personal danger. These very practical considerations warrant the utilization of an officer without responsibility for coping with the emergency itself to seize in a proper fashion evidence and contraband unexpectedly discovered in plain view during the legitimate intrusion occasioned by the emergency situation. Such legitimate law enforcement benefits may properly be considered by courts when balanced against minor perils to Fourth Amendment protections. Coolidge, *supra,* 403 U.S. 467.

We do not interpret the term "inadvertent" as used in Coolidge v. New Hampshire, *supra,* to encompass total surprise that evidence or contraband is present, for it is naive in the ex-

treme to believe that police would not expect to find such items during an emergency search of the scene of a crime. Rather the term "inadvertent" is contrasted in Coolidge to the circumstance where the discovery of the particular evidence is anticipated, where the police know in advance the location of the evidence and intend to seize it. 403 U.S. l.c. 470. That is not the situation here. While the police may have suspected that contraband was in the house they could not anticipate it or know of its location. The discovery was inadvertent. The intrusion into the house was justified by the emergency. The heroin and paraphernalia were discovered in plain view during that intrusion and were immediately recognized by Officer Brand for what they were.

Nor do we find that the actions of Brand in searching for evidence not in plain view affects the admissibility of the challenged evidence. The trial court properly suppressed evidence seized by Brand during that part of his search which exceeded the permissible limits under the "plain view" doctrine. The prophylactic purposes found to justify the rule of suppression of otherwise credible evidence are fully satisfied upon suppression of the evidence improperly obtained. That prophylaxis does not require suppression of evidence lawfully obtained. We find no error in the admission of the evidence.

As a sub-issue to this point, defendant challenges the admission of the shotgun into evidence on relevancy grounds. The gun was admissible to show motive, malice and knowledge as to both the assault and heroin charges. *See,* State v. Starks, 459 S.W.2d 249, (Mo. 1970) [1-5]; State v. Richardson, 515 S.W.2d 571 (Mo. 1974).

Defendant next contends that the evidence was insufficient to establish possession of the heroin, because the evidence established only joint control. Actual or constructive possession of the controlled substance together with the knowledge of the

fact of possession is an essential element which the state must prove. State v. Burns, 457 S.W.2d 721 (Mo. 1970). The possession need not be exclusive and may be established circumstantially. State v. Young, 427 S.W.2d 510 (Mo. 1968). Where joint control of a residence in which such substance is found is established there must be other evidence to support the inference of defendant's knowledge of the presence of the substance. State v. West, 559 S.W.2d 282. (Mo. App. 1977). The record does not make clear whether the bedroom in which the heroin was found was defendant's. But, when the police officers sought to purchase heroin from defendant he replied: "Just a minute, I'll go get them." He further was identified as the person who fired at Jacobsmeyer and Allen. Both his statement and his action inferring guilty knowledge were sufficient additional evidence to support a finding of knowing possession. State v. Wiley, 522 S.W2d 281 (Mo. banc 1975) [26]; State v. Stewart, 542 S.W.2d 533 (Mo. App. 1976) [16-19]; State v. Davis, 515 S.W.2d 773 (Mo. App. 1974) [9].

Defendant's final contention is that the court erred in failing to instruct on the lesser included offenses of assault without malice and common assault. Instructions on lesser included offenses are required only if supported by the evidence. When a deadly weapon is used in making an assault the law presumes malice and that the natural consequences of the act are intended in the absence of countervailing evidence. State v. Webb, 518 S.W.2d 317 (Mo. App. 1975) [5-6]. Here the evidence establishes that defendant fired two shots at and hit two police officers. His defense was that he was seeking to protect himself from men he believed to be burglars. He received a self-defense instruction. There is no evidence to support an instruction on a lessor degree of assault. The defendant was either guilty of assault with malice aforethought or he was not guilty on the basis of self-defense. State v. Webb, *surpa,* [7].

Judgment affirmed.

/s/ GERALD M. SMITH, JUDGE

/s/ HARRY L. C. WEIER,
CHIEF JUDGE

/s/ ROBERT O. SNYDER,
PRESIDING JUDGE

APPENDIX D

In the United States District Court
For the Eastern District of Missouri

Willie McCurry,
Reg. No. 33198
Missouri State Penitentiary
Jefferson City, Missouri

Plaintiff

vs.

Marvin Allen, Steven Jacobsmeyer,
and Unknown Police Officers, St.
Louis Police Department,
St. Louis, Missouri

Defendants.

Case No. _____

Civil Rights Complaint
Under 42 U.S.C.

Section 1983

(Filed July 17, 1978)

COMES NOW THE PLAINTIFF PRO SE, WILLIE McCURRY, and respectfully prays that this Court will order all defendants, including unknown police officers, to pay money damags of $1,000,000 (One Million Dollars) for the violation of the U.S. Constitutional Rights of the Plaintiff. In support of such relief, the Plaintiff states:

1.) The Plaintiff submits that the Defendants acted in a conspiracy to violate the U.S. Constitutional Rights of the Plaintiff.

2.) On or about April 9, 1977 at about 10:30 P.M. at 2525 No. Market St. in St. Louis, Missouri the Defendants came to the home of the Plaintiff, tried to force their way into the house, engaged in a gun battle, and then arrested the Plaintiff and then searched his house without a search warrant.

3.) The Defendants ordered the Plaintiff to come out of his house, which he did, and arrested the Plaintiff on the front sidewalk away from the house.

4.) When the Defendants came to the house, they did not wear uniforms, did not identify themselves immediately as police, forced their way into the house.

5.) The Defendants searched the house without obtaining a search warrant, and found drugs and other materal and contraband which was introduced in a criminal trial against the Plaintiff resulting in a conviction and Imprisonment.

6.) The Defendants admitted they searched the house in order to find contraband, and not to be certain that any other persons was in the house. The house was secured and the Defendants had over one hour before searching the house to obtain a search warrant but acted in a conspiracy not to obtain a search warrant.

7.) When the Plaintiff was arrested, he layed on the ground and was handcuffed. Then the unknown police officers assaulted the Plaintiff while he was handcuffed and helpless without provocation at all or reasonable cause, causing severe pain and injury to the Plaintiff. The Plaintiff had to go to the hospital for emergency medical care.

ARGUMENTS OF LAW

There is no doubt that the Defendants violated the U.S. Constitutional Rights of the Plaintiff by searching his house without a search warrant, since the Plaintiff was arrested on the front

sidewalk about 50 feet from the house. The Defendants searched the house in order to find contraband, not to find other people who may injure them. The Defendants had the Plaintiff handcuffed and helpless. The Defendants could have secured the premises and obtained a search warrant but refused to do so, violating the U.S. Constitutional Rights of the Plaintiff.

In a identical case at issue, the U.S. Supreme Court ruled in *Mincey* v. *Arizona,* ____ U.S. ____ (No. 77-5353, June 21, 1978) that:

> "Nor can the search be justified on the ground that a possible homocide inevitably presents an emergency situation, especially since there was no emergency threatening life or limb, all persons in the apartment having been located before the search began."
>
> "The seriousness of the offense under investigation did not itself create exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search, where there is no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant and there is no suggestion that a warrant could not easily and conveniently have been obtained."

Therefore, it is crystal clear that the Defendants acted in a conspiracy to violation of the U.S. Constitutional Rights of the Plaintiff to search his house without a search warrant, when in fact the Defendants could easily have secured the house and then obtained a search warrant from a judge. The Plaintiff was 50 feet from the house on the sidewalk, there was nobody in the house to hurt the police, and the Defendant's only purpose in searching the house was in order to find contraband itself, not to attempt to determine if there was any other people in the house that would pose a danger to the police then. The Defendants waited about an hour before searching the house by

themselves or other unknown police officers, showing that it was not an emergency situation indeed. The police should have taken the time to obtain a search warrant.

RELIEF

WHEREFORE, PLAINTIFF PRAYS THAT THIS COURT WILL GRANT THE FOLLOWING RELIEF:

1.) That this Court order the Defendants, including the unknown police officers, to pay the Plaintiff the sum of $1,000,000 (One Million Dollars) damages for the deliberate and intentional violation of the U.S. Constitutional Rights of the Plaintiff.

2.) That this Court declare that the Defendants violated the U.S. Constitutional Rights of the Plaintiff by searching his house without a search warrant.

Respectfully submitted,

/s/ Willie Mc Curry

FORMA PAUPERIS AFFIDAVIT AND OATH

I, WILLIE MC CURRY, do swear under oath that due to my poverty that I am unable to pay the costs of these proceedings or give securities thereof, that I have a meritorious action, and am entitled to relief from this court.

I, WILLIE MC CURRY, first being duly sworn to under oath, do depose and state that all statements herein are true and correct to the best of my knowledge.

/s/ Willie Mc Curry

[Jurat Omitted.]

APPENDIX E

In the United States District Court
Eastern District of Missouri
Eastern Division

Willie McCurry,

Plaintiff,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

MOTION TO DISMISS AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now defendants and move this Court to enter its order dismissing plaintiff's complaint on the grounds:

1. That the complaint against the St. Louis Police Department is based on respondent superior and as such cannot state a claim upon which relief can be granted.

2. That the complaint alleging unlawful search cannot be maintained and is barred by the doctrine of res judicata.

3. That the complaint alleging assault against unknown police officers does not state a claim upon which relief can be granted.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now defendants and move this Court to enter judgment in favor of defendants Marvin Allen and Steven Jacobsmeyer on the grounds:

1. That attached hereto as Exhibit I is a certified copy of the order of the Circuit Court regarding the search of plaintiff's

premises which holds that the search alleged in this complaint was lawful.

2. That the allegations in this complaint regarding the illegal search has been determined by a court of competent jurisdiction, and, therefore, is res judicata.

WHEREFORE, defendants pray the Court to dismiss the complaint or in the alternative to grant partial summary judgment on the issue of the illegal search.

[Signature and certificate of service omitted.]

"EXHIBIT I"

STATE OF MISSOURI,

City of St. Louis,

ss.

I, GEORGE M. SOLOMON, Clerk of the Circuit Court of the City of St. Louis, for Criminal Causes, which said Court is a Court of Record, having a Clerk and seal, certify that the above and foregoing is a full, true and complete copy of MOTION TO SUPPRESS and Memorandum of October 6, 1977, ruling on MOTION TO SUPPRESS. in the cause of the State of Missouri, plaintiff, vs WILLIE G. MC CURRY, CAUSE #77-862 defendant, as fully as the same appears of record and on file in my office.

WITNESS my hand and the seal of said Court hereto affixed, at office, in the City of St. Louis, this 31st day of August A.D. 1978.

/s/ George M. Solomon
Clerk of the Circuit Court of
the City of St. Louis, for
Criminal Causes.

[Remainder of Authentication Omitted.]

["EXHIBIT I" CONTINUED]

Cause No. 77-862
STATE OF MISSOURI
vs.
WILLIE G. MC CURRY

IN THE
CIRCUIT COURT
CRIMINAL CAUSES
CITY OF ST. LOUIS
Oct. 6 1977

Defendant's Motion to Suppress heard and submitted and overruled in part and sustained in part as follows.

(a) Motion to suppress overruled as to those items found in full view such as a gun and drugs on a dresser top and a shotgun.

(b) Motion sustained as to drugs and items found in drawers or among tires are suppressed.

CAUSES RETURNED TO DIV. 16
FOR FURTHER PROCEEDINGS

[SIGNATURES OMITTED.]

["EXHIBIT I" CONTINUED]

In the Circuit Court
of the City of St. Louis
State of Missouri

State of Missouri,
Plaintiff,
vs.
Willie Grady McCurry,
Defendant.
Cause No. 77-862

Charge: ASSAULT W. INT. TO KILL
ILLEGAL POSS OF HEROIN

MOTION TO SUPPRESS

(Filed September 16, 1977)

Defendant, by his counsel, moves the Court as follows:

1. There is now pending in this Court, the above captioned cause, wherein the defendant is charged with: ASSAULT WITH INTENT TO KILL (TWO COUNTS) and POSSESSION OF HEROIN

2. Your petitioner verily believes there is now in the hands of officials of the State of Missouri, and available to the attorney for the State of Missouri, evidence, which the State intends to use against the defendant, in the nature of: A Pistol 22 Caliber, and Heroin.

3. Your petitioner, respectfully moves the Honorable Court to suppress said evidence on the grounds that it was obtained by an unlawful and unconstitutional search and seizure, and as the result of an illegal arrest, all in violation of the defendant's

rights under Sections 10, 15, 18a, and 19 of Article I of the Constitution of the State of Missouri, and in violation of the defendant's rights under the 4th, 5th, 6th and 14th Amendments to the Constitution of the United States of America.

WHEREFORE, the premises considered, your petitioner moves the Honorable Court to suppress any and all evidence alleged to have been seized at the time of or just prior to the arrest of the defendant, and especially: A 22 Caliber Pistol and Heroin.

[Signature Omitted.]

APPENDIX F

In the United States District Court
For the Eastern District of Missouri

Willie McCurry, Plaintiff, vs. Marvin Allen, et al, Defendant.	Case No. 78-717C(1) Motion for Summary Judgment or Trial By Jury

COMES NOW THE PLAINTIFF PRO SE, WILLIE MC CURRY, and prays that this Court grant summary judgment for the Plaintiff, or in the alternative, grant a prompt trial by jury on this civil rights complaint. In support of such relief, the Plaintiff states:

1.) The Plaintiff is not suing the St. Louis Police Dept., but rather the police officers for the violation of his constitutional rights.

2.) The complaint is not barred by res judicata because only the Circuit Court of City of St. Louis has ruled that the search was legal, and the federal courts have not ruled that the search was legal. In *Smith* v. *Sinclair,* 424 F. Supp. 1108 (W.D. Okla. 1976), the federal district court had ruled on the issue of the violation of the federal constitutional rights. Just because the ste court has ruled against the Plaintiff regarding the legality of the search and seizure does not bar the Plaintiff from seeking judicial relief in the federal courts on the same issue. If that were the case, then this court could not rule on any habeas corpus petitons since the state circuit court and appeal courts rule against the prisoner on the allegations of violation of his constitutional rights. The Plaintiff is not seeking release from prison or a new trial, only money damages, and therefore this Court has jurisdiction to hold a trial in this matter.

3.) The Defendants in their pleadings do not deny that (a) the police officers did not obtain a search warrant, (b) the police officers waited one hour prior to searching the house so there is no claim of an emergency situation, (c) the police officers do not deny they could have secured the house and obtained a search warrant prior to the search, (d) the police officers did not search the house for people who might harm the police but to find contraband and drugs, (e) the Plaintiff was arrested about 50 feet in front of the house and could not have obtained weapons from the house as he was in custody and handcuffed, and (f) that the Defendants did not know as police officers that they had the obligation to obtain a search warrant prior to searching the house. There is no doubt that the search was unconstitutional. *Mincey* v. *Arizona,* ____ U.S. ____ (No. 77-5533, June 21, 1978); *Agnello* v. *U.S.,* 269 U.S. 20; *Preston* v. *U.S.,* 376 U.S. 364; *Chimel* v. *California,* 395 U.S. 752 (1969).

4.) The Plaintiff that a police officer by the name of Sargeant Burgdorf assaulted the Plaintiff while handcuffed, according to trial transcript. The Plaintiff did not know the name of this officer at the time of the filing of the civil rights complaint. The Plaintiffs alleged tht Sgt. Burgdorf used unnecessary amount of force in beating the Plaintiff with a nightstick or nightclub while Plaintiff was handicuffed behine his back, and this unjustified assault is cruel and unusual punishment. The Defendants do not claim that the amount of force used in striking the Plaintiff while handcuffed.

WHEREFORE, PLAINTIFF PRAYS THAT THIS COURT GRANT SUMMARY JUDGMENT OR ORDER A TRIAL BY JURY PROMPTLY IN THIS CASE.

[Signature Omitted.]

A MOTION TO DISPENSE WITH THE PRINTING

OF THE APPENDIX WAS MADE AND GRANTED

Cu

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-935

MARVIN ALLEN,
STEVEN JACOBSMEYER,
and
UNKNOWN POLICE OFFICERS,

Petitioners,

vs.

WILLIE McCURRY,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now respondent, Willie McCurry, who is now held in a Missouri state penitentiay, and pursuant to Rule 53, paragraph 1, of the Rules of the Court asks leave to file the attached Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of costs and to proceed in forma pauperis. The petitioner's Affidavit in Support of this Motion is attached hereto.

JEFFREY J. SHANK
ANDREW F. PUZDER
Appointed Counsel for Respondent
408 Olive Street
Suite 802
St. Louis, Missouri 63102
(314) 241-6116

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of January, 1980, a copy of the enclosed Motion for Leave to Proceed in Forma Pauperis and attached Affidavit was mailed, postage prepaid, to Mr. Jack L. Koehr, City Counselor; Mr. John J. Fitzgibbon, Associate City Counselor; and Mr. Robert H. Dierker, Jr., Assistant City Counselor, Attorneys for Petitioners, 314 City Hall, St. Louis, Missouri, 63103.

ANDREW F. PUZDER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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No. 79-935

MARVIN ALLEN,
STEVEN JACOBSMEYER,
and
UNKNOWN POLICE OFFICERS,

Petitioners,

vs.

WILLIE McCURRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Pro Se

By: JEFFREY J. SHANK
ANDREW F. PUZDER
408 Olive Street
Suite 802
St. Louis, Missouri 63102
Appointed Counsel in the
United States Court of
Appeals for the Eighth Circuit.

10

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Argument: The Petition for a Writ of Certiorari Should be Denied Because the Court Below Correctly Decided the Issues Presented in this Case	5
A. Collateral Estoppel is Inapplicable to the Basic Allegations in Respondent's Complaint	5
B. Petitioners Have Totally Ignored Section 1983's Legislative History and Totally Misread Stone v. Powell, 428 U.S. 465 (1976)	7
C. Petitioners' Interpretation as to the Applicability of Collateral Estoppel Would Deny a Federal Forum to Litigants with Meritorious Fourth Amendment Claims Thereby Contravening Section 1983's Intent and Purpose	12
D. The Decision Below is not in Conflict with Decisions from Other Circuits or Eighth Circuit Decisions	13
E. The Decision Below Gives Appropriate Consideration to Federal-State Comity	18
Conclusion	19

CASES CITED

	Page
Alexander v. Emerson, 489 F.2d 285 (5th Cir. 1973)	10
Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974)	15
Brubaker v. King, 505 F.2d 534 (7th Cir. 1974)	16
Clark v. Lutcher, 436 F. Supp. 1266 (M.D. Pa. 1977)	17
Cohens v. Virginia, 19 U.S. (6 Wheat) 262 (1821)	13
Harrison v. NAACP, 360 U.S. 167 (1959) (Douglas, J., dissenting)	8, 9
Kauffman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970)	15
Martin v. Delcambre, 578 F.2d 1164 (5th Cir. 1978)	14
Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975)	14
Meadows v. Evans, 550 F.2d 345 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977)	14, 16
Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971)	9, 15, 16
Mitchum v. Foster, 407 U.S. 225 (1972)	8, 9
Monroe v. Pape, 365 U.S. 167 (1961)	7, 8
Moran v. Mitchell, 354 F. Supp 86 (E.D. Va. 1973)	10
Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968)	9, 15
Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969)	15
Pierson v. Ray, 386 U.S. 547 (1967)	13
Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977)	9, 14, 17

Page

State v. McCurry, 587 S.W.2d 377 (Mo. App. 1979) 6

Stone v. Powell, 428 U.S. 465 (1976) 7, 9, 10, 11, 14

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Winters v. Lavine, 574 F.2d 46 (2nd Cir. 1978) 14

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CONSTITUTION, STATUTE AND RULES CITED

42 U.S.C. § 1983 (1970) 3, 4

Federal Rule of Civil Procedure, 12(b)(6) 12

Federal Rule of Civil Procedure, 56 12

U.S. Const., Amend. IV 3

U.S. Const., Amend. XIV 3

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McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250 (1974) 9

Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Va. L. Rev. 859 (1976) 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

MARVIN ALLEN,
STEVEN JACOBSMEYER,
and
UNKNOWN POLICE OFFICERS,

Petitioners,

vs.

WILLIE McCURRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Comes now respondent Willie McCurry and respectfully submits his Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (hereinafter referred to as Petition) filed in this cause.

OPINIONS BELOW

The opinion of the District Court, filed October 13, 1978, is reported at 466 F. Supp. 514 (E.D. Mo. 1978) (App. A to Pecition). The opinion of the Court of Appeals filed October 1, 1979, reversing the judgment of the District Court, is reported at 606 F.2d 795 (8th Cir. 1979) (App. B to Petition).

JURISDICTION

The judgment of the Court of Appeals was filed October 1, 1979. Respondent received the Petition December 15, 1979, and this Brief in Opposition is filed within thirty days of that date. Sup. Ct. R. 24(1). This Court has jurisdiction to consider the Petition under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court below was correct in holding collateral estoppel inapplicable in actions under 42 U.S.C. § 1983 raising search and seizure claims when to apply collateral estoppel would eliminate the only viable federal forum in which respondent can vindicate his fourth amendment rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.1/

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

1/ This Court has for many years held that the fourth amendment is applicable to the actions of state officials through the due process clause of the fourteenth amendment. See, e.g., Wolf v. Colorado, 338 U.S. 25, 25-8 (1949).

STATEMENT OF THE CASE

On July 17, 1978, respondent filed a claim under section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1970)) for damages against individual police officers alleging the following violations of his constitutional rights: (1) The police officers conspired to conduct an illegal search of his home; (2) his home was illegally searched; and (3) he was assaulted by police officers upon being arrested. 606 F.2d at 797; (Petition, App. B, A-6; App. D).

In response thereto, petitioners filed their Motion to Dismiss and Motion for Partial Summary Judgment. (Petition, App. E). The District Court granted respondent's motion for summary judgment, dismissing respondent's entire complaint with prejudice on the ground that:

> [T]he only issue in the instant lawsuit - whether the entrance into plaintiff's home and the resulting search was lawful - was litigated on the merits of his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search.

466 F. Supp. at 515-16; (Petition, App. A, A-3).

In reaching its determination, the District Court relied upon an order issued by the Circuit Court of the City of St. Louis, State of Missouri. This order dealt with respondent's motion to suppress evidence filed in his state court criminal trial and circumstantially related to the fourth amendment violation he alleges in his federal court section 1983 action. The state court sustained plaintiff's motion for suppression in part, and denied it in part. Substantively, the state court's order reads:

> "Defendant's Motion to Suppress heard and submitted and overruled in part and sustained in part as follows:
>
> "(a) Motion to suppress overruled as to those items found in plain view such as a gun and drugs on a dresser top, and a shotgun.
>
> "(b) Motion sustained as to drugs and items found in drawers or among tires are suppressed."

(Petition, App. E, A-27).

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court, concluding that "because of the special role of federal courts in protecting civil rights . . . and because habeas corpus is now unavailable to [respondent], see Stone v. Powell, supra, 428 U.S. at 492-94 and n.37, it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, [respondent's] § 1983 claims." 606 F.2d at 799; (Petition, App. B, A-10 - A-11).

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY DECIDED THE ISSUES PRESENTED IN THIS CASE.

A.

COLLATERAL ESTOPPEL IS INAPPLICABLE TO THE BASIC ALLEGATIONS IN RESPONDENT'S COMPLAINT.

As noted in respondent's Statement of the Case, supra, his complaint alleges three constitutional violations: (1) a conspiracy to conduct an illegal search of his home; (2) an illegal search of his home; and (3) an assault. As to respondent's assault claim, petitioners have properly

declined to challenge a reversal of the district court's order. The appellate court's reversal of the district court's dismissal of respondent's fourth amendment claim is likewise properly unchallengeable. Even if collateral estoppel was an appropriate doctrine in section 1983 cases alleging the violation of fourth amendment rights, the state court clearly held that respondent's fourth amendment rights were violated. The state court, in fact, suppressed certain evidence. (Petition, App. E, A-27).

The Missouri Court of Appeals, in considering respondent's appeal from his state court criminal conviction, recognized that the police officer conducting the search of plaintiff's home,

> found additional contraband in dresser drawers and hidden in some tires on a porch. Those items were not in plain view. After hearing on defendant's motion to suppress, the trial court sustained the motion as to those items found in drawers and the tires and denied the motion as to those items in plain view.

State v. McCurry, 587 S.W.2d 337, 340 (Mo. App. 1979); (Petition, App. C, A-15) (emphasis supplied).

Beyond question, the state court held that a search was conducted and evidence seized in violation of the fourth amendment. Thus, respondent is entitled to raise this violation of his constitutional rights, and a conspiracy to do so, in an action under section 1983 unencumbered by the doctrine of collateral estoppel.

Since this "meritorious" claim was litigated with "success in state court," petitioners should have no objection to its receiving "full attention from the federal courts. . . ." (Petition, p. 12). One wonders whether, under these circumstances, petitioners will so strongly support the applicability

of collateral estoppel or "issue preclusion" to an assertion by respondent that the constitutionality of this search has already been determined in his favor. (Petition, p. 7, n.2).

B.

PETITIONERS HAVE TOTALLY IGNORED SECTION 1983'S LEGISLATIVE HISTORY AND TOTALLY MISREAD STONE V. POWELL, 428 U.S. 465 (1976).

The only issue potentially before this Court on certiorari would be whether respondent is collaterally estopped from utilizing a federal forum to challenge the constitutionality of that portion of petitioners' search and seizure pursuant to which evidence was admitted against respondent in state court. Notably, since this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), rendered federal habeas corpus unavailable to respondent, section 1983 provides the only viable means by which he may obtain a federal forum.

Section 1983's legislative history plainly establishes that it was enacted to provide a federal forum for litigants in respondent's position who might have had an inadequate opportunity to protect their constitutional rights in state courts. See Monroe v. Pape, 365 U.S. 167, 180 (1961). Representative Coburn's comments during the debates over the Civil Rights Act's passage reflect congressional concern with the effectiveness of state courts in protecting federal rights. He stated:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under

> terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (Representative Coburn). See also, Mitchum v. Foster, 407 U.S. 225, 240-41 (1972) (quoting Senator Osborn, Representative Coburn, and Representative Perry); Monroe v. Pape, 365 U.S. 167, 172-87 (1971).

The Supreme Court has stated that section 1983's legislative history

> makes evident that Congress clearly conceived that it was altering the relationship between the State and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights, it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Mitchum v. Foster, 407 U.S. 225, 242 (1972). See also, Harrison v. NAACP, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting); Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Va. L. Rev. 859, 866-68 (1976); Comment, The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions, 1975 U. Ill. L. F. 95, 98-99 (1975).

The foregoing sources clearly reveal that the Congress which passed section 1983 had little faith in the ability of state courts to fairly adjudicate federal constitutional claims, and that it specifically intended to provide a supplementary federal remedy to protect such rights even where adequate state remedies existed. Congressional concern was centered on the protection of individual rights, not federalism, judicial resources, comity, or other policies

underlying the doctrine of collateral estoppel.

Congress has never altered its intent to make federal courts the primary protectors of constitutional rights through section 1983. As noted by Justice Douglas:

> The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today, the fact remains that there has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

Harrison v. NAACP, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting). See also, e.g., Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts as guardians of the peoples' federal rights); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250, 263-64 (1974) ("state courts may actually be less qualified" than federal courts to render constitutional decisions).

Nonetheless, many courts have held collateral estoppel applicable in actions under section 1983. Only two circuits, however, considered the applicability of collateral estoppel in section 1983 actions raising search and seizure claims, and both of these cases were decided prior to this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), which eliminated habeas corpus as a means for obtaining a federal forum in such cases. See Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Moreover, many of the courts

which have applied collateral estoppel in section 1983 actions expressly based their holdings on the availability of a federal forum through habeas corpus. See Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977); Thistlethwaite v. New York, 497 F.2d 339, 343 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Alexander v. Emerson, 489 F.2d 285, 286 (5th Cir. 1973) (per curiam); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973). Therefore, the only issue before this Court on certiorari would be whether Stone v. Powell, 428 U.S. 465 (1976) read in the light of section 1983 legislative history renders collateral estoppel inapplicable in section 1983 actions raising search and seizure claims. Whether collateral estoppel is applicable in section 1983 actions generally is not an issue the Court need reach in this case. The court below held collateral estoppel inapplicable under the circumstances of this case, and respondent submits that the court below was unquestionably correct.

Petitioners argue that the opinion of the court below is in conflict with this Court's holding in Stone v. Powell, 428 U.S. 465 (1976). (Petition, p. 6-10). As to this argument, petitioners have wholly misread Stone's holding.

Petitioners correctly state that in Stone, this Court held that where a state court "has provided an opportunity for full and fair litigation of Fourth Amendment claims," relief by way of habeas corpus is unavailable since the deterrent effect of such relief on unlawful police conduct is minimal. Id. at 494-96 (footnotes omitted); (Petition, p. 6). However, petitioners are incorrect in placing the emphasis in their analysis of Stone upon the concept of judicial economy.

Clearly, this Court's major concern in Stone was whether relief by way of habeas corpus in cases involving alleged violations of fourth amendment rights furthered the "primary justification" for the exclusionary rule, i.e., deterrence of illegal police practices. Id. at 486. It rejected habeas corpus as a viable means for reviewing state court exclusionary rule decisions because the "additional contribution [to the deterrence justification], if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs." Id. at 493 (portion in brackets added).

The societal costs of applying the exclusionary rule are basically that,

> the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

Id. at 489-90 (footnotes omitted). The major cost of the rule is, therefore, that it "deflects the truthfinding process and often frees the guilty." Id. at 490.

The holding in Stone presents absolutely no barrier to the use of section 1983 as a means for providing a federal forum to litigants alleging incorrect state court decisions on fourth amendment issues. A section 1983 action neither "deflects the truthfinding process" nor does it "free the guilty." Id. at 490. It merely provides a damage remedy. Moreover, Chief Justice Burger, concurring in Stone, partially justified the elimination of habeas corpus relief as a remedy for fourth amendment claims on the basis that alternative

remedies were still available. Id. at 500-01. As stated by the court of appeals below, "[a] § 1983 damage action is clearly one of the more obvious of such alternative remedies." 606 F.2d at 799; (Petition, App. B, A-10).

Thus, the opinion below is correct on the merits and in conformity with both the congressional intent underlying section 1983 and this Court's opinion in Stone.

C.

PETITIONER'S INTERPRETATION AS TO THE APPLICABILITY OF COLLATERAL ESTOPPEL WOULD DENY A FEDERAL FORUM TO LITIGANTS WITH MERITORIOUS FOURTH AMENDMENT CLAIMS, THEREBY CONTRAVENING SECTION 1983'S INTENT AND PURPOSE.

Petitioners assert that by applying collateral estoppel in cases such as the instant one, meritorious claims will receive prompt attention from federal courts while groundless civil litigation will be avoided. This assertion, of course, presupposes that the only meritorious search and seizure claims are ones in which a state court has applied the exclusionary rule. In sum, petitioners are asking this Court to assume that the state courts are always correct when ruling on fourth amendment issues. Section 1983's legislative history clearly discloses that Congress felt otherwise and intended to place responsibility for the protection of individual constitutional rights in the federal courts. See p. 7-9, supra.

Moreover, there is no need to fear an onslaught of groundless civil actions. The Federal Rules of Civil Procedure provide wholly adequate means for dealing with

groundless lawsuits. If a complainant is unable to allege facts sufficient to state a cause of action, his cause will be dismissed under Fed. R. Civ. P. 12(b)(6). If he is unable to demonstrate the existence of any material issues of fact, summary judgment under Fed. R. Civ. P. 56 will dispose of his case.

Nor do law enforcement officers who act with a good faith-reasonable belief in the legality of their actions need fear vexatious lawsuits. A good faith-reasonable belief in legality is a complete defense under section 1983, even if the challenged conduct actually violated an individual's constitutional rights. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967).

The real problem is that, should this Court uphold the applicability of collateral estoppel, federal district courts will be tempted to totally dismiss meritorious claims even though collateral estoppel is only arguably applicable to a portion of a cause. This is exactly what occurred in the instant case. See p. 5-7, supra; 446 F. Supp. at 515; (Petition, App. A, A-1 - A-3). Furthermore, litigants with meritorious fourth amendment claims, in which a state court decision was simply wrong, will never be provided with the federal forum contemplated by Congress in enacting section 1983. As to respondent's claim, the court below specifically noted that it was "serious and substantial." 606 F.2d at 799; (Petition, App. B, A-11).

The bottom line is that Congress, through section 1983, intended to provide litigants in respondent's position with a federal forum in which to vindicate their constitutional claims. Lacking a habeas corpus remedy, section 1983 is respondent's only avenue into federal court. As stated by

Chief Justice Marshall, the courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 19 U.S. (6 Wheat) 262, 404 (1821). It would simply be improper for the courts to refuse to hear meritorious claims out of a fear that non-meritorious claims might be filed. Thus, respondent asserts that the opinion below is correct and that certiorari should be denied.

D.

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS OR EIGHTH CIRCUIT DECISIONS.

The specific issue addressed by the court below was "whether [respondent's] § 1983 claim raising search and seizure questions is barred by collateral estoppel" even though "search and seizure claims, except in a few situations, can no longer be raised by state prisoners in federal habeas corpus actions." 606 F.2d at 798; (Petition, App. B, A-9). It specifically disclaimed any intent to consider the applicability of collateral estoppel in section 1983 actions generally. 606 F.2d at 798; (Petition, App. B, A-8). Respondent has consistently argued that collateral estoppel is an inappropriate doctrine in the instant case because the congressional intent behind section 1983 evinces legislative intent to provide a federal forum for review of state court decisions and the Supreme Court has eliminated habeas corpus as a viable means for obtaining federal review of state court decisions involving search and seizure claims. See Stone v. Powell, 428 U.S. 465 (1976). This is the position

which the court below sustained on appeal. 606 F.2d at 799.

This Court decided Stone on July 6, 1976. Most of the cases cited by petitioners were decided prior to Stone and/or did not involve search and seizure claims. Therefore, these cases did not consider the absence of federal habeas corpus review of state court decisions on search and seizure claims. (Petition, p. 15-19). See, e.g., Martin v. Delcambre, 578 F.2d 1164 (5th Cir. 1978) (no search and seizure claim); Winters v. Lavine, 574 F.2d 46 (2nd Cir. 1978) (same); Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977) (same); Meadows v. Evans, 550 F.2d 345 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977) (same); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975) (no search and seizure claim, prior to Stone); Thistlethwaite v. New York, 497 F.2d 339 (2nd Cir.), cert. denied, 419 U.S. 1093 (1974) (same, court applied collateral estoppel in partial reliance on availability of habeas corpus remedy); Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) (same); Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1970) (prior to Stone); Kauffman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970) (no search and seizure claim, prior to Stone); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968) (prior to Stone).

The case upon which petitioners appear to place the greatest weight is Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971). (Petition, p. 15-16). As noted above, Metros was decided prior to Stone and, therefore, the Tenth Circuit could not possibly have addressed the issues resolved by the court below. Moreover, the plaintiff in Metros unsuccessfully sought post-conviction relief in

the state and federal courts prior to bringing his action under the Civil Rights Act for damages. 441 F.2d at 314. The Court quoted Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969), a section 1983 action, noting that relitigation of the issues decided by the state court was unnecessary because "'the litigant is afforded an avenue for relief from an erroneous or unjust decision in the first court by appeal or some other appropriate means of re-examination.'" 441 F.2d at 317. Thus, in Metros, the plaintiff had already been afforded an "appropriate means of re-examination" and a federal forum through the utilization of federal habeas corpus relief. Id. Plaintiff in the instant case will not have this opportunity if the trial court's judgment is upheld. There was also a noteworthy concurrence by Judge Holloway in Metros, arguing that collateral estoppel was inapplicable because the issues presented in state court were not identical to those in plaintiff's civil rights action. 441 F.2d 318-19. See also, Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).

Petitioners also rely on Meadows v. Evans, 550 F.2d 345, 351 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977) (separate dissenting and concurring opinion of Circuit Judge Tjoflat). Circuit Judge Tjoflat's opinion cannot possibly create a conflict with the decision below in the instant case since the case did not involve a search and seizure claim and the comments cited by petitioners relating to fourth amendment claims were purely dicta. 550 F.2d 350-51.

Notably, Circuit Judges Goldberg, Tuttle, and Goldbold joined in Judge Tjoflat's opinion. Circuit Judge Goldberg issued a separate opinion also, joined by Judges Tuttle and

Goldbold, which states in relevant part:

> I would note that previous cases applying the doctrine elaborated by Judge Tjoflat have justified enforcement of a collateral estoppel bar in part on the availability of the federal habeas forum for redetermination of the prisoner's constitutional claim. See Brazzell v. Adams, 493 F.2d 489, 490 (5 Cir. 1974). Under the recent Supreme Court decision in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067, however, alleged violations of the fourth amendment may not be redetermined in federal habeas proceedings once fully and fairly litigated in the state courts. Application of the doctrine developed by Judge Tjoflat to such claims would accordingly preclude any federal forum from inquiring into a fourth amendment claim litigated in state criminal proceedings. I simply note that application of collateral estoppel to claims covered by Stone would raise an additional, troublesome question not involved in the case at bar.

550 F.2d at 345-46 (emphasis supplied).

Thus, contrary to petitioners' assertions (Petition, p. 17), the opinion of the Eighth Circuit in the instant case did not create a conflict with decisions from the Fifth or Tenth Circuits.

In a more recent case, cited by petitioners as creating a conflict (Petition, p. 15), the Fourth Circuit stated that it did not "see any practical problem" with applying collateral estoppel in section 1983 cases,

> as long as the state prisoner-plaintiff has or has had, access to a federal forum for the determination of his federal constitutional claims. Most state court prisoners do have such a right of access through 28 U.S.C.A. § 2254, but there are exceptions. Under Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), state court prisoners complaining of searches and seizures would usually have no such access to a federal forum. Others may be unable to meet the "in custody" requirement of § 2254, and never could have met it. Application of the rule of preclusion by reason of a state court conviction in those cases, therefore, may deny a state court prisoner

> access to a federal forum entirely. Since it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases. This problem has been noted by others, including Judge Goldberg in his separate opinion in Meadows v. Evans, 550 F.2d 345 (5th Cir. 1977); by Judge Coffin in Mastracchio v. Ricci, 498 F.2d 1257, 1260 n.2 (1st Cir. 1974); by Judge Merhige in Moran v. Mitchell, 354 F.Supp. 86 (E.D.Va. 1973).

Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977).

The only case respondent is aware of that considered and determined the post-Stone affect of collateral estoppel on section 1983 actions raising fourth amendment claims is Clark v. Lutcher, 436 F. Supp. 1266 (M.D. Pa. 1977) (probable cause for arrest). The decision in Clark was in conformity with the decision below.

Petitioners' allegations as to a conflict within the Eighth Circuit are wholly frivolous. The Eighth Circuit has simply never addressed this issue before the instant case. 606 F.2d at 798; (Petition, App. B, A-8 - A-10). Nor does the decision below open the door as to the applicability of collateral estoppel in section 1983 actions generally. The Court below specifically limited its decision to the situation where, under Stone, federal "habeas corpus is now unavailable." 606 F.2d at 799; (Petition, App. B, A-11).

Based on the foregoing, respondent submits that the decision below does not conflict with the decisions from any circuit and is correct on the merits.

E.

THE DECISION BELOW GIVES APPROPRIATE CONSIDERATION TO FEDERAL-STATE COMITY.

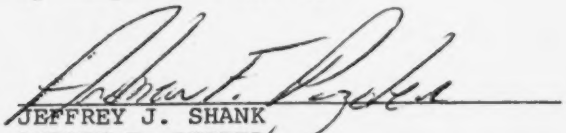
In deference to the Missouri state courts, the Court below held that the district court should abstain from hearing respondent's section 1983 claim "until the Missouri courts have had the opportunity to directly review [respondent's] conviction and the underlying search of his home." 606 F.2d at 799; (Petition, App. B, A-11). However, the Court below further noted that in "refusing [respondent] immediate relief", it was committing him to "perhaps years of litigating his § 1983 claim," which appeared to the Court to be "serious and substantial." 606 F.2d at 799; (Petition, App. B, A-11).

Respondent agrees that it is regrettable that he will be denied immediate relief, but submits that federal-state comity and the orderly administration of justice justify the decision of the Court below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
by Respondent Pro Se

By: 

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Appointed Counsel in the United States Court of Appeals for the Eighth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1980, a copy of the enclosed Brief for Respondent in Opposition was mailed, postage prepaid, to Mr. Jack L. Koehr, City Counselor; Mr. John J. Fitzgibbon, Associate City Counselor; and Mr. Robert H. Dierker, Jr., Assistant City Counselor, Attorneys for Petitioners, 314 City Hall, St. Louis, Missouri, 63103.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

RECEIVED
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SUPREME COURT, U.S.

No. 79-935

MARVIN ALLEN,
STEVEN JACOBSMEYER,
and
UNKNOWN POLICE OFFICERS,

Petitioners,

vs.

WILLIE McCURRY,

Respondent.

RESPONDENT'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, WILLIE McCURRY, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled cause, and, in support of my application for leave to proceed in forma pauperis, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I brought this cause under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Missouri for violations of my fourth amendment rights. The

District Court dismissed this cause applying collateral estoppel, and the United States Court of Appeals for the Eighth Circuit reversed the District Court on all points. Petitioners have filed for a Writ of Certiorari to review the Court of Appeals decision alleging that collateral estoppel is applicable in actions under 42 U.S.C. § 1983 involving violations of fourth amendment rights. I am filing this affidavit so that I may respond in forma pauperis.

Willie McCurry
WILLIE McCURRY

Signed and sworn to before me this DEC 28 1979 day of DEC 28 1979, 1979, in the State of DEC 28 1979, County of _____.

FLOYD A. GEORGE
Notary Public State of Missouri
COUNTY OF CALLAWAY
My Commission Expires Oct. 25, 1983.

Floyd A. George
Notary Public

My commission expires:

_____

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No. 79-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARVIN ALLEN, STEVEN JACOBSMEYER and
UNKNOWN POLICE OFFICERS,
Petitioners,

vs.

WILLIE MCCURRY,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Summary of Argument	8
Argument	12
I. The Court of Appeals Erred in Refusing to Recognize and Apply Established Federal Rules of Collateral Estoppel to Respondent's Action Under 42 U.S.C. §1983 So As to Preclude Respondent From Relitigating a Constitutional Claim (Namely a Claim of Unlawful Search and Seizure) Which Had Been Raised, Fully and Fairly Litigated, and Decided Adversely to Him in a Prior State Criminal Proceeding, Notwithstanding the Unavailability of Federal Habeas Corpus	12
A. Principles of Collateral Estoppel Have Consistently Been Applied in Federal Courts, As a Matter of Federal Law, and Are Implicity in and Consistent with the Body of Tort Law Which Provides the Basis of Federal Law under 42 U.S.C. §1983	12

B. The Legislative History of 42 U.S.C. §1983 Discloses No Intention to Interfere with Application of Neutral and Established Principles of Law by Federal Courts in Dealing with State Judgments, or of Undermining the Concurrent Jurisdiction of State Courts over Federal Constitutional Questions, So Long as the State Courts Provided Adequate Opportunities for Full and Fair Litigation of Federal Claims 19

C. The "Federal Res Judicata Act", 28 U.S.C. §1738, also Compels Application of Collateral Estoppel in §1983 Actions 24

D. Application of Federal Rules of Res Judicata and Collateral Estoppel in §1983 Actions Cannot Properly Be Conditioned on the Availability of Federal Habeas Corpus Relief 26

E. Persons Bringing Actions Under §1983 Are Barred from Relitigating Constitutional Claims Which Have Been Raised, Fully Litigated and Decided Adversely to Them in Prior State Criminal Proceedings 29

II. The Court of Appeals Must Be Reversed Because, As a Matter of Law, Respondent is Estopped to Maintain His Action Under 42 U.S.C. §1983 On the Basis of the Same Claim of Unlawful Search Which the Record Indisputably Shows to Have Been Raised, Fully and Fairly Litigated, and Decided Adversely to Him in a Prior State Criminal Proceeding 35

Conclusion 39

Table of Authorities

Cases:

Alexander v. Emerson, 489 F.2d 285 (5th Cir. 1973) 28

Angel v. Bullington, 330 U.S. 183 (1946) 13,27,29,32,33

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 13,30,37

Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) 17,32

Brown v. Allen, 344 U.S. 443 (1953) 34

Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970) 17

Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974) 17,28

Brubaker v. King, 505 F.2d 534 (7th Cir. 1974) 17

Careaga v. James, 474 F.Supp. 464 (E.D.Mo. 1979), aff'd, _____ F.2d _____ (8th Cir. 1980) 14

Carey v. Piphus, 435 U.S. 247 (1978) 37

Clark v. Lutcher, 436 F.Supp. 1266 (M.D.Pa. 1977).... 23

Curtis v. Tower, 262 F.2d 166 (6th Cir. 1959)..... 17

DiGiangiemo v. Regan, 528 F.2d 1262 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976)..... 30

Donovan v. Dallas, 377 U.S. 408 (1964) 13

Egan v. Wisconsin State Board, etc., 332 F.Supp. 964 (E.D.Wis. 1971)..... 23

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951) 14,30,31

England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) 10,22,23,30,32,33

Entick v. Carrington, 19 St.Tr. 1030 (1765) 17

Erwin v. Henry, 5 Mo. 469 (1838) 16

Estelle v. Gamble, 429 U.S. 97 (1976) 35

Fay v. Noia, 372 U.S. 391 (1963) 8

Fernandez v. Trias Monge, 586 F.2d 848 (1st Cir. 1978). 32

Ferres v. Wignoll, Noy 58, 74 Eng.Rep. 1027 (C.P.1596) 16

Frank v. Mangum, 237 U.S. 309 (1915)..... 13

Gideon v. Wainwright, 372 U.S. 335 (1963) 18

Gomez v. Toledo, 602 F.2d 1018 (1st Cir. 1979), cert. granted, 48 USLW 3451 (Jan. 15, 1980)..... 38

Goodrich v. Supreme Court of South Dakota, 511 F.2d 316 (8th Cir. 1975)..... 18

Gray v. Swan, 1 Har. & John. 142 (Md. 1801) 16

Green v. Sarmiento, 10 F.Cas. 1117 (No. 5, 760) (C.C. Pa. 1810) 16

Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978) 16

Green v. Wyrick, 428 F.Supp. 732 (W.D.Mo. 1976) 15

Grubb v. Public Utilities Comm., 281 U.S. 470 (1930) .. 13

Hague v. C.I.O., 307 U.S. 496 (1939) 22

Hammer v. Town of Greenburgh, 440 F.Supp. 27 (S.D.N.Y. 1977), aff'd from bench, 578 F.2d 1368 (2d Cir. 1978)..... 17

Henderson v. Goeke, 329 F.Supp. 1160 (E.D.Pa. 1971), aff'd mem., 491 F.2d 749 (2d Cir. 1973)..... 37

Hormel v. Helvering, 312 U.S. 552 (1940) 25

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 14

Hughes v. Cornelius, 2 Show. 232, 89 Eng.Rep. 907 (K.B. 1682) 16

Hustler v. Raines, 2 Lut. 1414, 125 Eng.Rep.780 (C.P. 1695) 16

Imbler v. Pachtman, 424 U.S. 409 (1976) 16

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 16

Jones v. Bales, 58 F.R.D. 453 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973) 36

Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970) 17,18

Kingston's (Duchess) Case, 1 East, P.C. 468, 168 Eng. Rep. 175, 20 St.Tr. 355 (1776) 16

Kline v. Burke Const. Co., 260 U.S. 226 (1922) 23

Kurek v. Pleasure Driving & Park Dist., 583 F.2d 378 (7th Cir. 1978), cert. denied, 99 S.Ct. 873 (1979) .. 30

LaRose v. Casey, 570 S.W.2d 746 (Mo.App. 1978) 25

Mapp v. Ohio, 367 U.S. 643 (1961) 11

Martin v. Delcambre, 578 F.2d 1164 (5th Cir. 1978) 17

Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S.909 (1975) 17,18,30,36,37

Menna v. New York, 423 U.S.61 (1975) 33

Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1970) 17,18,27,32,36

Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) 24

Miranda v. Arizona, 384 U.S. 436 (1966) 32

Mitchum v. Foster, 407 U.S. 225 (1972) 19,22,23

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) . 14,19

Monroe v. Pape, 365 U.S. 167 (1961) ...8,14,15,19,20,22,33,34

Montana v. United States, 440 U.S. 147 (1979) 13
14,16,30,31,32,33,36

Moran v. Mitchell, 354 F.Supp. 86 (E.D.Va. 1973)..... 28

Mosher v. Saalfeld, 589 F.2d 438 (9th Cir.), cert. denied, 99 S.Ct. 2883 (1979) 36

Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).... 17

Nations v. Johnson, 65 U.S. (24 How.) 195 (1861) 13

Ney v. California, 439 F.2d 1285 (9th Cir. 1971) 17

Nichols Charolais Ranch, Inc. v. Barton, 460 F.Supp. 228 (M.D.Fla. 1975), aff'd mem., 587 F.2d 809 (5th Cir. 1979) 30

Omernick v. LaRocque, 406 F.Supp. 1156 (W.D. Wis.), aff'd mem., 539 F.2d 715 (7th Cir. 1976) 24

Outram v. Morewood, 3 East 347, 102 Eng.Rep. 630 (K.B. 1803)..... 16

P I Enterprises v. Cataldo, 457 F.2d 1012 (1st Cir. 1972) 28

Palma v. Powers, 295 F.Supp. 924 (N.D.Ill. 1969) 17,18,31

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) ...13,30,37

Parrish v. Ferris, 67 U.S. (2 Black) 606 (1862) 13

Paul v. Davis, 424 U.S. 693 (1976)..... 15

Pierson v. Ray, 386 U.S. 547 (1967) 8,15,16,38

Preiser v. Rodriquez, 411 U.S. 475 (1973) 14

Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976) 24

Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) 25

Reich v. City of Freeport, 527 F.2d 666 (7th Cir. 1976).. 17

Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977) 17,18,27

Robb v. Connolly, 111 U.S. 624 (1884) 13,28,31

Rodriguez v. Beame, 423 F.Supp. 906 (S.D.N.Y. 1976) 17,30,36

Rodriguez v. Jones, 473 F.2d 599 (5th Cir. 1973)..... 15

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)..... 13,34

Sealfon v. United States, 332 U.S. 575 (1948) 14

Shapiro v. Columbia Union Bank & Trust Co., 576 S.W.2d 310 (Mo.banc), cert. denied, 100 S.Ct. 60 (1979) 34

Smith v. Sinclair, 424 F.Supp. 1108 (W.D.Okla. 1976).. 17,36

Spatt v. New York, 361 F.Supp. 1048 (E.D.N.Y. 1973), aff'd mem., 414 U.S. 1058 (1973) 34

Stone v. Powell,, 428 U.S. 465 (1976).....7,9,18,26,27,28,31

Stump v. Sparkman, 435 U.S. 349 (1978) 16

Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S.1093 (1974) 17,18,28,29

Tollett v. Henderson, 411 U.S. 258 (1973) 33

Townsend v. Sain, 372 U.S. 293 (1963) 8,33

United States v. Agee, 440 F.Supp. 614 (E.D.Pa. 1977) . 34

United States v. Calandra, 414 U.S. 338 (1974) 26

United States v. Smith, 595 F.2d 1176 (9th Cir. 1979) ... 34

Williams v. Murdoch, 330 F.2d 745 (3d Cir. 1964) 24

Wayside Transp. Co. v. Marcell's Motor Express, Inc., 284 F.2d 868 (1st Cir. 1960) 24

Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972) 17

Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978) . 17,24,30,31,32,36

Weeks v. United States, 272 U.S. 383 (1914) 17

Wolff v. McDonnell, 418 U.S. 539 (1974)..... 14

Zurek v. Woodbury, 446 F.Supp. 1149 (N.D.Ill. 1978) . 23

Constitutional and Statutory Provisions:

U.S. Const., Art. V, Supremacy Clause 12

U.S. Const., Amdt. IV 2

U.S. Const., Amdt. XIV, §l 3,18

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1738.....4,10,24,25

28 U.S.C. §2101 2

Labor Management Reporting and Disclosure Act, §301, 29 U.S.C. §185 20,28

Ku Klux Klan Act, 17 Stat. 13, 42 U.S.C. §1983 .....Passim

Civil Rights Act of 1866, 14 Stat. 27 20,22

Legislative History:

Cong. Globe, 38th Cong., 1st Sess., ... 28

Cong. Globe, 42nd Cong., 1st Sess., ... 20

Other Authorities:

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Note, Civil Rights Enforcement and the Selection of Federal District Court Judges, 21 St.L.U.L.J. 395 (1977) 28

Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv.L.Rev. 1486 (1969)..... 15

Note, The Preclusive Effect of State Judgments on Subsequent 1983 Actions, 78 Col.L.Rev. 610 (1978).....15,24,31

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the District Court, filed on October 13, 1978, is reported at 466 F.Supp. 515 and appears in Appendix A to the petition for certiorari, pp. A-2 - A-3. The opinion of the Court of Appeals, 606 F.2d 795, is reproduced in Appendix B to the petition for certiorari, pp. A-4 - A-12. The opinion of the Missouri Court of Appeals, Eastern District, 587 S.W.2d 337, affirming the conviction of Willie McCurry on state felony charges arising out of matters alleged in his complaint, is reproduced in Appendix C to the petition for certiorari, pp. A-13 - A-20.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, reversing a judgment of the Distict Court in Petitioners' favor, was filed on October 1, 1979. Rehearing was not sought. The petition for certiorari was docketed in this Court on December 14, 1979. See 28 U.S.C. §2101. Certiorari was granted on February 19, 1980. This Court has jurisdiction by reason of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in refusing to recognize and apply established federal rules of collateral estoppel to Respondent's action under 42 U.S.C. §1983, so as to preclude Respondent from relitigating a constitutional claim (namely a claim of unlawful search and seizure) which had been raised, fully and fairly litigated, and decided adversely to him in a prior state criminal proceeding.

II. Whether the Court of Appeals must be reversed because, as a matter of law, Respondent is estopped to maintain his action under 42 U.S.C. §1983 on the basis of the same claim of unlawful search which the record indisputably shows to have been raised, fully and fairly litigated, and decided adversely to him in a prior state criminal proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act") as codified at 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.[1]

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[1] The original text of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, reads as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in the like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

The federal judicial code, 62 Stat. 947, 28 U.S.C. §1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Both the District Court and the Court of Appeals appear to have drawn the more colorful details concerning the events underlying the complaint in this case from a police report filed in response to a request for production of documents. See Docket Entry 9/12/78. Petitioners will confine their statement of the case to those facts which appear from the face of the complaint and the cross-motions for summary judgment with their supporting exhibits. (Since this case is proceeding without an Appendix, references will be to the appendices to the petition for certiorari or directly to the original documents in the record.)

On July 17, 1978, Willie McCurry (hereinafter referred to as "Respondent") filed a verified *pro se* complaint in the United States District Court, Eastern District of Missouri, against Marvin Allen, Steven Jacobsmeyer and "Unknown Police Officers" (hereinafter collectively referred to as "Petitioners"). Petition for certiorari (Pet. Cert.), A-21. The complaint was denominated by Respondent as a "Civil Rights Complaint Under 42 U.S.C. Section 1983." Id.

Claiming that Petitioners had acted in a conspiracy to violate his constitutional rights, id., paragraph 1, Respondent alleged that on or about April 9, 1977, Petitioners conducted an unlawful search of his home in St. Louis, Missouri. Id., A-22, paragraph 2. The search followed a gun battle culminating in Respondent's arrest and was conducted without a warrant. Id., paragraphs 2, 3, 5. The search yielded evidence which was introduced at a state criminal trial, whereby Respondent was convicted and imprisoned. Id., paragraph 5; see also id., A-27 -A-29. (The Court of Appeals and the District Court took notice of Respondent's conviction on one count of illegal possession of heroin and two counts of assault with intent to kill with malice aforethought in state circuit court on January 6, 1978, convictions which were affirmed by the Missouri Court of Appeals on August 14, 1979. See 466 F.Supp. 515; 606 F.2d 796; 587 S.W.2d 337; Pet. Cert. A-2, A-6, A-13.) Respondent also alleged that he was assaulted by unknown police officers after his arrest on April 9. Id., A-22, paragraph 7.

In the District Court, Petitioners moved for dismissal and partial summary judgment on Respondent's complaint. Pet. Cert., A-25. The motion for partial summary judgment was directed to Petitioner's claim of unlawful search, and adduced in support an authenticated copy of a motion to suppress evidence, filed by Respondent's defense counsel in the state trial court, and the memorandum order of the state court denying the motion except as to drugs and items not found in plain view. Id., A-26 - A-29. Petitioners sought dismissal of the claim of

assault on the ground that the complaint failed to state a claim upon which relief could be granted. Id., A-25.

In response to Petitioners' motion, Respondent (still *pro se*) filed a "Motion for Summary Judgment or Trial By Jury," admitting that the state courts had upheld the legality of the search mentioned in his complaint, but arguing that the state judgment could not have preclusive effect. Pet. Cert., A-30, paragraph 2. The cross-motion also identified a police officer who allegedly assaulted Respondent. Id., A-31, paragraph 4.

In passing on the cross-motions for summary judgment, the District Court read Respondent's complaint as raising only the issue of the legality of the entrance into and search of his home. Although recognizing that some evidence was suppressed by the state court, the District Court noted that the impact of the state court's decision on the motion to suppress was "that the police lawfully entered the house pursuant to a lawful arrest and lawfully searched the house for evidence." 466 F.Supp. 515, Pet. Cert., A-3. Thus, the same claim asserted by Respondent under 42 U.S.C. §1983 - the legality of the entrance into and search of Respondent's home - had been "litigated on the merits at his criminal trial in state court and determined adversely to his position." Id. Accordingly, the District Court held that Respondent was collaterally estopped from relitigating the constitutionality of the search. The entire complaint - including the claim of assault - was then dismissed. 466 F.Supp. 516, Pet. Cert. A-3.

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court in all respects.[2] Although the Court of Appeals acknowledged that "the search and seizure aspect of his [McCurry's] claim was ... essentially the same claim that

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[2] Insofar as the Respondent's claim of assault is concerned, Petitioners do not seek review of the Court of Appeals' judgment. See Pet. Cert. at 4 n. 1.

was litigated at the suppression hearing" (606 F.2d 797, Pet. Cert., A-7), the Court nevertheless concluded that collateral estoppel was not available to the police officers as a defense. The basis for this decision was stated as follows: "We conclude that because of the special role of the federal courts in protecting civil rights ..., and because habeas corpus is now unavailable to appellant, see *Stone* v. *Powell*, [428 U.S. 465 (1976)], it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's §1983 claims." 606 F.2d 799, Pet. Cert., A-10 - A-11. In so holding, the Court of Appeals denied that it was passing on the general question of "whether collateral estoppel applies to §1983 actions when the issues raised in the §1983 suit were determined adversely to the §1983 plaintiff in an underlying state criminal trial." Id., 797, Pet. Cert., A-17.

SUMMARY OF ARGUMENT

I.

Petitioners maintain that the Court of Appeals committed error in failing to apply general federal rules of collateral estoppel to Respondent's claim under 42 U.S.C. §1983.

This Court has frequently recognized and given effect to the well-established principle of our federal system that the judgments of state courts of concurrent jurisdiction on federal constitutional issues are entitled to preclusive effect, when the same issues are raised in federal litigation involving essentially the same parties. Considerations of comity, judicial integrity and fairness to defendants buttress this well-known tenet of federal law, and strongly militate in favor of its application to §1983 actions. Moreover, the concept of collateral estoppel is deeply rooted in Anglo-American law, and has been applied in all types of cases, including tort cases. Since this Court, in *Pierson* v. *Ray*, 386 U.S. 547 (1967), has enunciated the doctrine that liability under 42 U.S.C. §1983 is quintessentially governed by the principles of the law of torts, it is manifest that the defense of collateral estoppel, like other traditional common law defenses, must be available to defendants in §1983 cases.

Just as *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Townsend* v. *Sain*, 372 U.S. 293 (1963), propagated an enormous brood of federal habeas corpus petitions, so *Monroe* v. *Pape*, 365 U.S. 167 (1961) loosed a torrent of civil rights litigation by breathing new life into 42 U.S.C. §1983 (hereinafter sometimes referred to as "§1983"). Among the problems continually faced by the lower federal courts awash in this torrent is the effect, if any, to be accorded prior state court judgments as to constitutional claims sought to be relitigated under §1983. This problem has been greatly exacerbated by the volume of civil rights complaints filed by state prisoners alleging constitutional violations which have previously been rejected in the course of state

criminal proceedings. In coping with the torrent, the vast majority of lower federal courts, relying on the established federal law of collateral estoppel, have generally accorded preclusive effect to prior state criminal judgments on constitutional issues raised by §1983 plaintiffs. In doing so, these courts have relied only partially - and frequently not at all - on the availability of federal habeas corpus relief to such plaintiffs. Petitioners now ask this Court to endorse the fundamental principles underlying these many cases, regardless of the availabilty vel non of federal habeas corpus.

Considerations of comity, judicial integrity and fairness in large measure influenced this Court in placing a limit on federal habeas corpus relief in search and seizure cases, in *Stone* v. *Powell*, 428 U.S. 465 (1978). These same considerations demand that §1983 not be transmuted into the civil analogue of federal habeas corpus - especially in search and seizure cases. In light of *Stone*, the Court of Appeals in the instant case refused to accord any preclusive effect whatsoever to the state criminal court judgment adverse to Respondent on his claim of unlawful search; and the Court of Appeals thereby not only failed to take cognizance of the policy considerations prompting *Stone* but also wholly misconceived the role to be played by federal courts in the scheme of §1983, when state judgments on federal claims are reached after full and fair litigation.

Albeit the Ku Klux Klan Act (whence §1983 is derived) and other post-Civil War legislation gave the federal courts a new and special responsibility for vindicating federal rights, nothing in the legislative history of those statutes evinces a Congressional intent to disturb the historic concurrent jurisdiction of state courts over federal constitutional questions properly before them. Rather, through §1983, Congress was wont to establish a supplementary civil remedy, to meet the exigency when the state courts could not or would not provide a full and fair opportunity to litigate claims involving federally-guaranteed rights. Use of established federal principles of col-

lateral estoppel would in no way undermine the Congressional policy or vary from the Congressional purpose embodied in §1983.

Indeed, adherence to federal preclusion rules is powerfully induced (perhaps mandated) by another statute, in its origins long antedating §1983 and reenacted without material change after §1983. Since repeals by implication are not favored in federal law, and given the equivocal legislative history of §1983, Congressional policy and intent in several areas would be best served by construing §1983 in harmony with the "Federal Res Judicata Act", 28 U.S.C. §1738. Such an harmonious construction leads ineluctably to incorporation of principles of collateral estoppel in the body of federal law developing under §1983.

The principles of collateral estoppel advocated by Petitioners are simple. When a federal constitutional issue, such as the legality of a search and seizure, is distinctly placed in issue before a state court of competent jurisdiction, fully and fairly litigated, and decided on the merits, the subsisting state judgment, be it civil or criminal, ought to preclude a subsequent action brought under §1983 by a party to the state court proceeding who seeks to raise the same federal claim. These rules can and should be applied without regard to highly technical notions of mutuality; and (although the question is not presented in the instant case) probably ought to be applied in instances (e.g., counseled guilty pleas) where resolution of the constitutional claim, if raised, would materially affect the result. (Of course, the rules need not apply when the circumstances are the same as those in *England* v. *Louisiana Medical Examiners*, 375 U.S. 411 (1964) or where the state court expressly disclaims application of or reliance on federal law in rendering its judgment.) Since the Court of Appeals failed to consider or apply these principles in this case, its judgment must be reversed.

II.

Applying established federal preclusion principles to the case at bar, it is evident that partial summary judgment was proper, and that the Court of Appeals erred in reversing the District Court. There was no issue of fact raised by the cross-motions for summary judgment. The pleadings and exhibits showed that the identical claim of unlawful search appearing in Respondent's complaint herein was raised by him in his state criminal case, wherein he was represented by counsel. The record also shows that the question of the legality of the search of Respondent's house was accorded a full and fair hearing in the state court, and that the warrantless search of the Respondent's house was held to be lawful. This decision necessarily involved a determination respecting Respondent's Fourth Amendment rights, pursuant to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), as the decision of the Missouri Court of Appeals makes clear. *State* v. *McCurry*, 587 S.W.2d 337 (Mo.App. 1979); Pet. Cert. Appendix C, A-13. Although some fruits of the search were suppressed, the District Court correctly construed Respondent's complaint as seeking redress solely for the alleged warrantless intrusion into his house, pursuant to an alleged conspiracy. Both of these claims necessarily fell when the state court adjudged the warrantless entry to be lawful. Thus, Petitioners were entitled to partial summary judgment as a matter of law, and the judgment of the Court of Appeals must be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REFUSING TO RECOGNIZE AND APPLY ESTABLISHED FEDERAL RULES OF COLLATERAL ESTOPPEL TO RESPONDENT'S ACTION UNDER 42 U.S.C. §1983 SO AS TO PRECLUDE RESPONDENT FROM RELITIGATING A CONSTITUTIONAL CLAIM (NAMELY A CLAIM OF UNLAWFUL SEARCH AND SEIZURE) WHICH HAD BEEN RAISED, FULLY AND FAIRLY LITIGATED, AND DECIDED ADVERSELY TO HIM IN A PRIOR STATE CRIMINAL PROCEEDING, NOTWITHSTANDING THE UNAVAILABILITY OF FEDERAL HABEAS CORPUS.

A. Principles of Collateral Estoppel Have Consistently Been Applied In Federal Courts, As a Matter of Federal Law, and Are Implicit In and Consistent With the Body of Tort Law Which Provides the Basis of Federal Law Under 42 U.S.C. §1983.

In a case arising under the Supremacy Clause in Article V of the Constitution, this Court recently had occasion to make a number of observations which are worth quoting in full:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ..." ... Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. ... Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. ... Application of both doctrines is

> central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.... To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. *United States*, 440 U.S. 147, 153-154 (1979) (citations and footnotes omitted). The Court then proceeded to apply the principle of collateral estoppel to preclude the United States from relitigating in federal court the constitutionality of a state statute which had already been upheld by the state courts in prior proceedings over which the Government had control.

Montana v. *United States* represents the most recent in a long series of cases in which this Court has answered in the negative the question "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328 (1971), even when the issue is a federal constitutional issue and the judicial resolution is that of a state court. See, e.g., *Angel* v. *Bullington*, 330 U.S. 183 (1946); *Grubb* v. *Public Utilities Comm.*, 281 U.S. 470 (1930); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415 (1923); *Frank* v. *Mangum*, 237 U.S. 309, 333 (1915); *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884); *Parrish* v. *Ferris*, 67 U.S. (2 Black) 606 (1862); *Nations* v. *Johnson*, 65 U.S. (24 How.) 195 (1861).

In developing and applying principles of res judicata and collateral estoppel in federal cases as a matter of federal law, *Donovan* v. *Dallas*, 377 U.S. 408 (1964), the Court has recognized and accepted the abandonment of highly technical notions of mutuality, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), and has accorded preclusive effect to prior criminal as

well as civil proceedings, see *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951); *Sealfon* v. *United States*, 332 U.S. 575 (1948). The question now becomes whether 42 U.S.C. §1983 requires an exception to these settled rules.

This Court has previously intimated that established principles of res judicata and collateral estoppel would be fully applicable to actions under 42 U.S.C. §1983, e.g., *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 606 n. 18 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539, 554 n. 12 (1974); *Preiser* v. *Rodriquez*, 411 U.S. 475, 497 (1973). The Court of Appeals, enamored of its own conception of the special role of federal courts in protecting civil rights, see 606 F.2d 799, Pet. Cert. A-10, saw fit to disregard these intimations in this case, but common sense and common law strongly support the express application to §1983 actions of the same principles which controlled *Montana* v. *United States, supra.*

Surely the need to stanch "the torrent of civil rights litigation of the last 17 years" is obvious. See *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 724 (1978) (*Rehnquist, J.*, dissenting). The statistics reflecting the actual, incontrovertible "flood of litigation" loosed by *Monroe* v. *Pape*, 365 U.S.167 (1961), have been alluded to in the petition for certiorari, pp. 10-11, and need not be reiterated here. Suffice it to say that this flood demonstrates beyond cavil that the traditional interests justifying use of res judicata and collateral estoppel were never more compelling than in the context of §1983 litigation. This increase in §1983 cases parallels a startling increase in state court litigation involving complaints against law enforcement officers. See table in brief of Amici Curiae (AELE, et al.), p. 14. It may be safely said that a majority, perhaps a significant majority, of §1983 claims filed against State officials, including law enforcement officers, especially those filed by convicted and imprisoned felons, are insubstantial and even frivolous. See. e.g., *Careaga* v. *James*, 474 F.Supp. 464 (E.D.Mo. 1979), aff'd, ___ F.2d ___ (8th Cir., No. 79-1723, March 17, 1980)

(suit filed by state prisoner against deceased state judge and the people of the City of St. Louis, arising out of comments made by judge when sentencing prisoner 8 years earlier); *Green* v. *Wyrick*, 428 F.Supp.732 (W.D.Mo. 1976). If the judgment of the Court of Appeals in this case is left intact, it is virtually certain that this volume of unnecessary litigation will increase - and the risk will be enhanced that harassed District Judges may pay insufficient attention to meritorious claims.

The risks inherent in the uncontrolled relitigation, via §1983, of constitutional claims already fully litigated in state court have been perceived by many commentators, see Currie, *Res Judicata: The Neglected Defense*, 45 U.Chi.L.Rev. 317 (1978); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 Col.L.Rev. 610 (1978); Note, *Limiting the Section 1983 Action in the Wake of Monroe* v. *Pape*, 82 Harv.L.Rev. 1486 (1969), including those who oppose the use of traditional res judicata and collateral estoppel principles to give preclusive effect to state court judgments, see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va.L.Rev. 250, 257 (1974); Averitt, *Federal Section 1983 Actions after State Court Judgment*, 44 U.Colo.L.Rev. 191, 196-97 (1972); see also Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw.L.Rev. 859 (1970). It would seem, however, that the use of traditional rules of preclusion would be preferable to devising new mechanisms for dealing with duplicative §1983 litigation, especially in view of the prevailing standards of liability under §1983.

It is by now well settled that the standards of liability under §1983 are quintessentially tort liability standards, *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Rodriguez* v. *Jones*, 473 F.2d 599 (5th Cir. 1973; although the statute by no means creates a general federal law of torts, see *Paul* v. *Davis*, 424 U.S. 693 (1976). Accordingly, in articulating liability under §1983, this Court has recognized various defenses derived from defenses available

under the common law of torts. E.g., *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Pierson* v. *Ray, supra*. In somewhat the same vein, this Court has authorized the "borrowing" of analogous state statutes of limitations to preclude the assertion of stale claims under the federal civil rights acts. Compare *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975) with *Green* v. *Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978).

Principles of res judicata and collateral estoppel are of ancient provenance and are firmly embedded in Anglo-American jurisprudence. Long before §1983 was enacted, it was recognized here and in England that prior judgments - even of courts of foreign jurisdictions - could and should be accorded preclusive effect in subsequent actions, whether the action sound in tort or otherwise. See, e.g., *Erwin* v. *Henry*, 5 Mo. 469 (1838); *Green* v. *Sarmiento*, 10 F. Cas. 1117, 1118-19 (No. 5,760) (C.C.Pa. 1810); *Gray* v. *Swan*, 1 Har. & John. 142 (Md. 1801); *Outram* v. *Morewood*, 3 East 347, 102 Eng.Rep. 630 (K.B. 1803); *Kingston's (Duchess) Case*, 1 East, P.C. 468, 168 Eng.Rep.175, 20 S.Tr. 355 (1776); *Hughes* v. *Cornelius*, 2 Show. 232, 89 Eng. Rep. 907 (K.B. 1682); cf. *Hustler* v. *Raines*, 2 Lut. 1414, 125 Eng.Rep. 780 (C.P. 1695); see generally, Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 Vand.L.Rev. 683, 684 notes 5-7 (1966); M. Bigelow, *A Treatise on the Law of Estoppel* 6, 103 ff., 190 ff. (1913); 2 (Part 2) J. Smith, *A Selection of Leading Cases on Various Branches of the Law* ("*Smith's Leading Cases*") 744-94 (1885). Indeed, as early as 1596, a Justice of Common Pleas is reported as saying that "barr by judgment amounts to a release in law; or otherwise sutes would be infinite." *Ferres* v. *Wignoll*, Noy 58, 74 Eng.Rep.1027 (1596). Of course, as anyone who has studied under the eminent legal historian Samuel Thorne can attest, it would be rash to suppose that all of the principles enunciated in *Montana* v. *United States, supra*, were accepted and invariably applied by common law courts since Bracton's day,

see *Hustler* v. *Raines, supra*; but neither was the exclusionary rule viewed as a necessary and powerful vindicator of individual rights until a comparatively late date. Compare *Weeks* v. *United States*, 232 U.S. 383 (1914) with *Entick* v. *Carrington*, 19 St.Tr. 1030 (1765). The point is that the need for principles of preclusion, and the interests served by such principles, have been perceived by the common law courts for centuries, and must be regarded as inherent in the law of torts giving substance to federal law under §1983.

The overwhelming majority of the lower federal courts have consistently recognized the appropriateness of applying principles of res judicata and collateral estoppel in §1983 actions. E.g., *Martin* v. *Delcambre*, 578 F.2d 1164 (5th Cir. 1978); *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978); *Rimmer* v. *Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir.1977); *Mastracchio* v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975); *Brown* v. *DeLayo*, 498 F.2d 1173 (10th Cir. 1974); *Thistlethwaite* v. *City of New York*, 497 F.2d 339 (2d Cir.), cert.denied, 419 U.S. 1093 (1974); *Brazzell* v. *Adams*, 493 F.2d 489 (5th Cir. 1974); *Metros* v. *United States District Court*, 441 F.2d 313 (10th Cir. 1970); *Kauffman* v. *Moss*, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970); *Brown* v. *Chastain*, 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970); *Hammer* v. *Town of Greenburgh*, 440 F.Supp. 27 (S.D.N.Y 1977), aff'd from bench, 578 F.2d 1368 (2d Cir. 1978); *Smith* v. *Sinclair*, 424 F.Supp. 1108 (W.D. Okla. 1976); *Rodriguez* v. *Beame*, 423 F.Supp. 906 (S.D.N.Y. 1976); *Palma* v. *Powers*, 295 F.Supp. 924 (N.D.Ill. 1969); compare *Reich* v. *City of Freeport*, 527 F.2d 666 (7th Cir. 1976) and *Williams* v. *Liberty*, 461 F.2d 325 (7th Cir. 1972) with *Brubaker* v. *King*, 505 F.2d 534 (7th Cir. 1974); compare *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968) with *Curtis* v. *Tower*, 262 F.2d 166 (6th Cir. 1959); but see *Ney* v. *California* 439 F.2d 1285 (9th Cir. 1971). All of these cases involve the giving of preclusive effect to state court judgments on federal constitutional issues. Many involve

underlying state criminal proceedings, e.g., *Mastracchio* v. *Ricci, supra; Thistlethwaite* v. *City of New York, supra; Metros* v. *United States District Court, supra; Kauffman* v. *Moss, supra.*[3] The better-reasoned cases have relied primarily on the traditional justifications for applying preclusion principles, relying only secondarily, if at all, on the availability of federal habeas corpus relief to §1983 plaintiffs seeking to attack state criminal judgments. Compare *Thistlethwaite, supra, Metros, supra,* and *Palma* v. *Powers, supra,* with *Rimmer* v. *Fayetteville Police Dept., supra.*

The majority view of the lower courts is clearly correct. Indeed, until the instant case, the Court of Appeals for the Eighth Circuit had generally adhered to that view. See, e.g., *Goodrich* v. *Supreme Court of South Dakota,* 511 F.2d 316 (8th Cir. 1975). The Court of Appeals argued in its opinion here, see 606 F.2d 798-99, Pet. Cert. A-9 - A-11, that the unavailability of federal habeas corpus after *Stone* v. *Powell,* 428 U.S. 465 (1976), and the need to accord a federal forum to criminals alleging unlawful search and seizure claims justify an exception to the rule. As will be shown at greater length, *post,* such arguments do not overcome the need for application of the established federal law of res judicata and collateral estoppel to actions brought under §1983.

The majority view of the lower courts on the issues in this case is in accord with the weight of general federal precedent, with the overwhelming weight of common law authority, and with the tort liability standards underlying §1983 and is in accord with common sense. The lower federal courts have recognized the pressing need for preclusion of duplicative litigation through

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[3] In view of the extensive safeguards engrafted on state criminal proceedings under the Fourteenth Amendment, see, e.g., *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), there is seemingly more reason to accord preclusive effect to a state criminal judgment than to a state civil judgment on a federal constitutional issue.

the medium of §1983, lest friction between federal and state courts be increased, defendants (such as Petitioners here) be unfairly subjected to multiple and potentially inconsistent adjudications, and the essential respect of a republican society for its judiciary be seriously eroded by the spectacle of endless litigation and at times inconsistent decisions. The error of the Court of Appeals in ignoring the foregoing legal principles and compelling public interests demands reversal of the judgment below.

B. The Legislative History of 42 U.S.C. §1983 Discloses No Intention to Interfere With Application of Neutral and Established Principles of Law By Federal Courts In Dealing With State Judgments, Or of Undermining the Concurrent Jurisdiction of State Courts Over Federal Constitutional Questions, So Long As the State Courts Provided Adequate Opportunities For Full and Fair Litigation of Federal Claims.

The Court of Appeals, in deciding to deny Petitioners the defense of collateral estoppel in this case, relied heavily on its concept of "the special role of federal courts in protecting civil rights." 606 F.2d 799, Pet. Cert., A-10. See also, McCormack, *supra*, 60 Va.L.Rev. 276-77 (arguing that §1983 is the "civil analogue" of federal habeas corpus). However, an examination of the legislative history and the legal and historical context of the statute involved here leads to the firm conviction that the Court of Appeals' conception of the intended role of the federal courts in cases such as this was patently erroneous.

Petitioners recognize the perils of reliance on the legislative history of the Ku Klux Klan Act, 17 Stat. 13 (42d Cong., 1st Sess. 1871). Compare *Monroe* v. *Pape, supra,* with *Monell* v. *Dept. of Social Services, supra.* The legislative history of Section 1 of that Act, whence 42 U.S.C. §1983 is derived, has been canvassed at length by this Court in other cases, see *Monroe, supra,* and *Mitchum* v. *Foster*, 407 U.S. 225 (1972), and is probably best described as equivocal. Nevertheless, a careful reading of

the legislative history of the 1871 Act and its kindred predecessor, the Civil Rights Act of 1866, 14 Stat. 27 (38th Cong., 1st Sess., 1866) reveals that Congress did not intend to disturb the jurisdiction of state courts over federal questions. Rather, it is reasonably clear that Congress conceived that it was enacting what Mr. Justice Douglas described as a "supplementary" remedy, a federal remedy available when the state remedy, adequate in theory, was not available in practice. *Monroe* v. *Pape, supra*, 365 U.S. 173-74, 183.

The overriding concern of Congress in 1871 was with the activities of the Ku Klux Klan and its sympathizers, who were perceived as acting in a powerful combination to thwart the enforcement of state and federal law in such fashion as to nullify the rights of black citizens and Republicans in the South. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 319-21 (Rep. Stoughton), 333-35 (Rep. Hoar), 412 (Rep. Roberts), 456-57 (Rep. Coburn). Thus, most of the debate concerned §2 of the Act, now 42 U.S.C. §1985, relating to conspiracies to deprive citizens of federal rights; the first section received substantially less attention from proponents and opponents alike.

True, the 42d Congress did perceive that it was altering the relationship between state and federal courts, see, e.g., Cong. Globe, 42d Cong., 1st Sess., 653 (Sen. Osborn), but this alteration was seen in the context of giving the federal courts new jurisdiction, rather than abolishing the existing and recognized jurisdiction of the state courts, even as to federal questions.[4] On several occasions, the "concurrent" jurisdiction of the state and federal courts was alluded to, but the passages reveal no intention to disturb established law in that area. See, e.g., id., 514 (Rep. Poland), 695 (Sen. Edmunds). Even Rep. Coburn, who

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[4] General federal question jurisdiction was not conferred on federal courts until 1875. See *Monroe* v. *Pape, supra*, 365 U.S. 252 (Frankfurter, J., dissenting).

spoke passionately in favor of trusting our federal courts, spoke also of his belief that, by reason of the 1871 Act, "the tumbling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought, themselves, equal protection to all." Id., 460. That the supplementary nature of the remedy being provided was clearly understood is perhaps best illustrated by the following passages from the remarks of Rep. Sheldon and Senator Edmunds. Rep. Sheldon, who voted for the bill, discussed the manner in which national power should be exercised to protect federal rights (id., 368):

> Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authority except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed upon them.... It is as much the duty of the national Government to support that of the State, and to maintain its authority, as it is to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen.
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> . . . It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution. . . .

Senator Edmunds, the floor manager of the bill in the Senate, in concluding debate on the measure, observed (id. 697-98):

> The bill, like all bills of this character, in its first and second sections, is a declaration of rights and a provision for the punishment of conspiracies against constitutional rights, and a redress for wrongs. It does not undertake to overthrow any court. It does not undertake to make any war. It does not undertake to interpose itself out of the regular order of the administration of law. It does not at-

> tempt to deprive any State of the honor which is due to the punishment of crime. It is a law acting upon the citizen like every other law, and it is a law to be enforced by the courts through the regular, and ordinary processes of judical administration, and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice.

The view that §1983 was not intended to provide a mechanism for collateral attack on state judgments reached after full and fair litigation is reinforced by the Civil Rights Act of 1866, the first statute to create federal jurisdiction in civil rights cases, see *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), and the progenitor of §1 of the Ku Klux Klan Act. See *Monroe* v. *Pape, supra*, 365 U.S. 256 (Frankfurter, J., dissenting). Even in 1866, with the Civil War a much more vivid memory than in 1871, Senator Trumbull, the leading Senate advocate of the 1866 Act, spoke in favor of overriding President Johnson's veto as follows (Cong. Globe, 38th Cong., 1st Sess., p. 1759):

> So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in-conflict with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, . . .

Thus, the legislative history of §1983 and other civil rights legislation, which seemingly can be construed *in pari materia*, does not support the inference that principles of res judicata and collateral estoppel cannot be applied in §1983 actions. Nor do *Mitchum* v. *Foster, supra,* or *England* v. *Louisiana Medical Examiners*, 375 U.S. 411 (1964) require a different conclusion.

In *Mitchum*, the relief sought was an injunction against pending state court proceedings involving First Amendment rights; the state court had not yet reached a final judgment on the merits. It has been said that *Mitchum* was wrongly decided, see Currie, *supra*, 45 U.Chi.L.Rev. at 327; be that as it may, the case does not express an overriding policy of state court inadequacy, id., 333, and it is readily distinguishable from the case at bar, for there was no judgment to estop the plaintiff in *Mitchum*. See, e.g., *Clark* v. *Lutcher*, 436 F.Supp. 1266 (M.D.Pa. 1977), in which the §1983 action was commenced prior to rendition of state court judgment on the merits.

Similarly, in *England* v. *Louisiana Medical Examiners*, it was held in substance that a litigant who has first invoked federal jurisdiction, and is remitted to state court by reason of the abstention doctrine, is not perforce required to submit his federal claims to the state court for determination, but may reserve them for his return to the federal court after adjudication of the state law issues. Neither *England* nor *Mitchum* holds that §1983 permits collateral attack on state court judgments on federal constitutional issues; rather, they are exceptional situations arising precisely because §1983 does evince a Congressional policy of preserving concurrent state jurisdiction over federal constitutional questions. Cf. *Egan* v. *Wisconsin State Board, etc.*, 332 F.Supp. 964 (E.D. Wis. 1971). Merely because *Mitchum* and *England* to some extent create a potential for a "race" to judgment, cf. *Kline* v. *Burke Const. Co.*, 260 U.S. 226 (1922), does not justify an additional sacrifice of judical economy and federal-state comity by abandoning ordinary principles of preclusion in §1983 cases. See *Zurek* v. *Woodbury*, 446 F.Supp. 1149 (N.D.Ill. 1978).

In summary, the evil sought to be remedied by Congress in 1871 was the situation in which the state courts were unable or unwilling to protect federal rights. The remedy enacted was a supplementary remedy, which left established federal principles of res judicata and collateral estoppel substantially intact and

evinced no intent to vitiate their future application in actions under §1983.

C. The "Federal Res Judicata Act", 28 U.S.C. §1738, Also Compels Application of Collateral Estoppel In §1983 Actions.

Another factor impelling adherence to federal rules of res judicata and collateral estoppel in the instant case is the so-called "Federal Res Judicata Act", 28 U.S.C. §1738. This statute was originally enacted in 1790, see 1 Stat. 122, and was reenacted in 1948, 62 Stat. 947. Both before and after the enactment of the Civil Rights Acts, §1738 was construed in accordance with its plain meaning: the statute imposed upon the federal courts the duty to give full faith and credit to state judgments to the same extent as the state court would give its own judgment. E.g., *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 (1813); *Wayside Transp. Co.* v. *Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960). The statute embodies a Congressional policy that there be an end of litigation. *Wayside Transp. Co., supra.*

It has been persuasively argued that §1983 was enacted against the backdrop of the Congressional policy evinced by §1738 and, viewed in that light, no intent to delimit §1738 can be discerned in the legislative history of §1983. Accordingly, since repeals by implication are not favored, e.g., *Radzanower* v. *Touche, Ross & Co.*, 426 U.S. 148, 154 (1976), §1738 compels federal courts to give preclusive effect to state court judgments in §1983 actions seeking to relitigate issues previously decided. See generally Currie, *supra*, 45 U.Chi.L. Rev. 327-33; see also *Winters* v. *Lavine, supra*, 574 F.2d at 54-55; *Omernick* v. *LaRocque*, 406 F.Supp. 1156 (W.D. Wis.), aff'd mem., 539 F.2d 715 (7th Cir. 1976); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions, supra;* cf. *Williams* v. *Murdoch*, 330 F.2d 745 (3d Cir. 1964).

In the present case, the judgment of the court in Respondent's criminal case would be accorded preclusive effect

under the law of Missouri in a subsequent civil proceeding in a Missouri court. E.g., *LaRose* v. *Casey*, 570 S.W.2d 746 (Mo.App. 1978). A fortiori, under 28 U.S.C. §1738, the District Court was correct in precluding Respondent from relitigating the search and seizure claim in this §1983 action. However, Petitioners recognize that the implementation of federal statutes representing countervailing and compelling federal policies sometimes justifies departures from a strict application of the "full faith and credit" rule of §1738. *Red Fox* v. *Red Fox*, 564 F.2d 361, 365 n. 3 (9th Cir. 1977). Doubtless it will be argued that §1983 involves such countervailing and compelling federal policies.

Petitioners acknowledge that a mechanical application of §1738 to actions under 42 U.S.C. §1983 may be undesirable, insofar as it would lead to a lack of uniformity in federal decisions, since different states employ different standards of res judicata and collateral estoppel. But it does not follow that the policy enunciated by §1738 should be jettisoned; rather, the policy of §1738 to bring an end to litigation can readily be harmonized with the policy of §1983 that citizens be assured of a forum for full and fair litigation of claims of federal right. The result is the application of federal rules of res judicata and collateral estoppel.[5]

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[5] It may be argued also in this case that Petitioners failed adequately to raise the issue of §1738's applicability in the Court of Appeals and the District Court, since that statute was not specifically mentioned in Petitioners' "Suggestions in Support of Motion to Dismiss and Summary Judgment", filed together with the Motion appearing at Pet. Cert. A-25. But surely the question of the effect of §1738, "the Federal Res Judicata Act", is necessarily implied in any contention that a state judgment is entitled to preclusive effect in a federal case. Indeed, the failure of the Court of Appeals to consider §1738 in reaching its decision may well be plain error. See *Hormel* v. *Helvering*, 312 U.S. 552 (1940). In any event, before this Court, Petitioners rely on §1738 merely as adducing an additional reason for applying a federal rule of collateral estoppel to this case, although §1738 could undoubtedly serve as an independent basis for reversing the Court of Appeals.

D. Application of Federal Rules of Res Judicata and Collateral Estoppel In §1983 Actions Cannot Properly Be Conditioned On the Availability of Federal Habeas Corpus Relief.

The Court of Appeals in this case appears to have reasoned somewhat as follows: a federal forum must always be available for the full litigation of federal constitutional claims involving search and seizure; federal habeas corpus relief is no longer available to convicted felons asserting such claims; so §1983 must provide the federal remedy, and collateral estoppel perforce cannot be applied. Q.E.D. Serious flaws in the Court of Appeals' approach in this case have been explored above and given those manifold flaws, it does not require a specially lively imagination to infer that the result reached by the Court of Appeals is as much a product of dissatisfaction with the judgment of *Stone* v. *Powell*, 428 U.S. 465 (1976) as of concern for effectuating the policies of §1983. Indeed, in rejecting Petitioners' defense of collateral estoppel, the Court of Appeals devoted no attention whatever to the policy considerations underlying *Stone*.

In *Stone*, this Court held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 494 (footnotes omitted). In the course of its opinion, the Court reaffirmed that the exclusionary rule is a judicially created remedy "'designed to safeguard Fourth Amendment rights generally through its deterrent effect ...'" id., 486, quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), and concluded that, in collateral proceedings, the societal costs of the application of the exclusionary rule significantly outweighed the deterrent effect gained thereby. 428 U.S. 491-93. In assessing the societal costs of the rule's application in collateral proceedings, the Court was naturally aware that the exclusionary rule's operation is inimical to the truth-finding

process, but the Court also adverted to "serious intrusions on values important to our system of government," including effective utilization of limited judicial resources, the need for finality in criminal actions, minimization of friction between state and federal judicial systems, and the maintenance of the constitutional balance upon which federalism is founded. Id., 491 n. 31.

Stone must be read as standing for the proposition that rules of federal law fashioned by federal judges ought to be enunciated with an eye to fostering judicial economy and federal-state comity, without sacrificing the interests of justice or essential constitutional rights. Like the exclusionary rule, res judicata and collateral estoppel are essentially judge-made rules which are intended to protect important rights. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste; res judicata and collateral estoppel reflect "the refusal of law to tolerate needless litigation." *Angel* v. *Bullington, supra*, 330 U.S. 192-93. Thus, to the extent that res judicata and collateral estoppel conserve judicial time, preserve respect for the administration of justice, prevent harassment of litigants, and minimize conflicts between federal and state courts, the application of those principles in §1983 actions is consistent with and complements *Stone* v. *Powell*. Compare *Stone, supra*, 428 U.S. 491 n. 31 with Vestal & Coughenour, *supra*, 19 Vand.L.Rev. 719.

It is true, as the Court of Appeals observed, 606 F.2d 798, Pet. Cert. A-10, that a number of courts addressing the questions presented in this case felt that the availability of federal habeas corpus relief was of importance in determining whether to apply collateral estoppel in §1983 actions. E.g., *Rimmer* v. *Fayetteville Police Dept., supra*. However, it is also true that many of the lower courts did not regard the availability of federal habeas corpus relief as crucial. E.g., *Metros* v. *United States District Court, supra*. Moreover, some courts which took note of federal habeas corpus did not regard its availability as a

predicate for giving preclusive effect to state judgments in §1983 cases, but rather saw the writ as a means to remove the bar presented by the subsisting state judgment. E.g., *Alexander* v. *Emerson,* 489 F.2d 285 (5th Cir. 1973); cf. *Moran* v. *Mitchell,* 354 F.Supp. 86 (E.D.Va. 1973). The fact that habeas corpus no longer provides a means to remove the bar of the state judgment in search and seizure cases is immaterial, so long as §1983 does not inherently require a federal forum for litigation of such claims - and it does not, as Petitioners have heretofore demonstrated.

The matter of the availability of federal habeas corpus becomes ever more ephemeral when it is recalled that collateral estoppel has been applied in other §1983 cases where the state judgment was not vulnerable to attack via habeas corpus - cases involving important federal constitutional rights. See, e.g., *Brown* v. *DeLayo, supra*; *Olitt* v. *Murphy*, 453 F.Supp. 354 (S.D.N.Y. 1978); cf. *Thistlethwaite* v. *City of New York, supra* (availability of habeas corpus at most an alternative justification for collateral estoppel).

The concern of the federal courts in §1983 cases involving prior state judgments on federal constitutional issues should be with the opportunity accorded the claimant for full and fair litigation - not with whether the forum was a state or federal forum. As previously noted, the state courts have historically been presumed capable of fully and fairly adjudicating federal constitutional issues properly before them, see, e.g., *Robb* v. *Connolly, supra*, 111 U.S. at 637; *P I Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st Cir. 1972); as even the framers of the early civil rights acts acknowledged. E.g., Cong. Globe, 38th Cong., 1st Sess., 1759. Certainly this Court is rightly "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." *Stone* v. *Powell, supra*, 428

U.S. at 493-94 n. 35.[6] If preclusive effect could be given to state judgments in §1983 cases before *Stone* v. *Powell*, there is no sound reason to suspend the practice now.[7]

E. Persons Bringing Actions Under §1983 Are Barred From Relitigating Constitutional Claims Which Have Been Raised, Fully Litigated and Decided Adversely to Them In Prior State Criminal Proceedings.

From the foregoing, it is manifest that §1983 was not intended to foster career litigants, *Thistlethwaite* v. *City of New York, supra*, and the availability of the defenses of res judicata and collateral estoppel is consonant both with the tort liability standards inferred from §1983 and with a virtually unbroken line of federal precedents respecting the finality of state court judgments on federal constitutional issues properly before them. It necessarily follows that federal rules of res judicata and collateral estoppel can and must be applied to actions brought under 42 U.S.C. §1983 to preclude needless litigation. "Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion." *Angel* v. *Bullington, supra*, 330 U.S. at 193.

The question now becomes, what are the governing federal principles of collateral estoppel applicable to actions such as the case at bar?

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[6] To the tendentious civil rights advocate, not even the federal courts are free of the taint customarily ascribed to state courts. See Note, *Civil Rights Enforcement and the Selection of Federal District Court Judges*, 21 St.L.U.L.J. 385, 426 (1977).

[7] Petitioners would observe that many of the difficulties created by this cause could be obviated by the abandonment of the exclusionary rule and the recognition of §1983 as a grant of jurisdiction similar to that of §301 of the Labor-Management Relations Act, 29 U.S.C. §185. See Pet. Cert, 12-14. Of course, that question is not precisely before the Court at this time.

First, there must be a final judgment of a state court. There is some dispute over whether a state judgment pending on appeal is entitled to preclusive effect, but the weight of the better-reasoned cases would accord preclusive effect to the final judgment of the state court of first instance, notwithstanding pendency of an appeal. See *DiGiangiemo* v. *Regan*, 528 F.2d 1262, 1265 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976); *Kurek* v. *Pleasure Driving & Park Dist.*, 583 F.2d 378 (7th Cir. 1978), cert. denied, 99 S.Ct. 873 (1979); *Rodriguez* v. *Beame, supra*; but see *Nichols Charolais Ranch, Inc.* v. *Barton*, 460 F.Supp. 228 (M.D.Fla. 1975), aff'd mem., 587 F.2d 809 (5th Cir. 1979). (Of course, if there is a possibility that the state judgment will be reversed on appeal, and there is a risk that in the meantime the statute of limitations will run against the claim of the §1983 plaintiff, the federal court could temporarily stay proceedings in the §1983 case. Cf. *England* v. *Louisiana Medical Examiners, supra.*) It is irrelevant whether the prior state proceeding is civil or criminal. *Emich Motors Corp.* v. *General Motors Corp., supra; Mastracchio* v. *Ricci, supra*; see generally Vestal & Coughenour, *supra*, 19 Vand.L.Rev.711-15, 716-17.

The §1983 plaintiff must have been a party to the prior state proceeding. *Montana* v. *United States, supra;* see also *Parklane Hosiery Co.* v. *Shore, supra; Blonder-Tongue Laboratories* v. *University of Illinois Foundation, supra; Mastracchio* v. *Ricci, supra.* This requirement will be readily met when the prior state proceeding was a criminal case, as here, where the plaintiff was the defendant in the state case. The fact that the defendant in a criminal case may be "compelled" to submit his federal constitutional claims to the state court as an "involuntary" litigant is not material. See *Winters* v. *Lavine, supra,* 574 F.2d at 58. A state defendant who submits his federal constitutional claims to a state court to avoid conviction, at the risk of precluding a §1983 claim, is not put to a "Hobson's choice." Compare Theis, *Res Judicata in Civil Rights Cases, supra*, 70 Nw.L.Rev. 872-73. Such an argument assumes, first, that §1983 was in-

tended to assure unlimited availability of a federal forum, and, second, that the state courts cannot really be trusted to give full and fair consideration to criminals defendants' constitutional claims. Both assumptions are manifestly false.[8] As adumbrated above, §1983 was not intended to guarantee availability of a federal forum, nor did it supplant the firmly embedded principle that state courts are constitutionally required to give effect to paramount federal law and will not be presumed to be indifferent to their duty. See *Stone* v. *Powell, supra,* 428 U.S. at 493-94 n. 35; *Robb* v. *Connolly, supra; Palma* v. *Powers, supra,* 295 F.Supp. at 937; discussion *ante,* pp. 19-23.

The next question must be whether the issues presented by the §1983 litigation are in substance the same as those resolved by the state judgment. See *Montana* v. *United States, supra,* 440 U.S. at 155. Normally, the record of the state proceeding must be examined to determine if the §1983 plaintiff's claim was "distinctly put in issue and directly determined" in the state case. See *Winters* v. *Lavine, supra; Kauffman* v. *Moss, supra,* 420 F.2d 1274; see also *Emich Motors Corp.* v. *General Motors Corp., supra.* The examination of the record of the state case also permits the federal court to ascertain whether the state court afforded a "full and fair opportunity" for litigation of the federal constitutional issues - the critical factor in deciding whether to preclude relitigation of a claim in a §1983 action. Cf. *Montana* v. *United States, supra,* 440 U.S. at 163-64 n. 11 and accompanying text; Note, *supra,* 78 Col.L.Rev. 642-52. If the record reflects that the state court denied assistance of counsel or any other critical element of procedural due process, the judgment may not be entitled to preclusive effect, although it

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[8] Ironically, one of the arguments Respondent will undoubtedly make for affirmance of the judgment below is that he is not estopped, because the state court here upheld his constitutional claim by partially granting his motion to suppress. See Respondent's Brief Opposing Certiorari, p. 5.

would seem that unfairness or procedural inadequacy should not be lightly inferred.

Another inquiry to be made is whether controlling facts or legal principles have changed significantly since the state court judgment. *Montana* v. *United States, supra*, 440 U.S. 155. To cite an extreme example, a §1983 suit involving Fifth Amendment rights would have to be viewed differently if the state criminal judgment relied on legal rules obtaining before *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Similarly, if the state judgment proceeded on factual assumptions which materially differed from the facts raised in the subsequent §1983 action, collateral estoppel will not apply. *Montana* v. *United States, supra*, at 159.

Most elementary of all, the examination of the prior state judgment must determine whether it adjudicated the relevant issues adversely to the §1983 plaintiff. There is some sentiment that only a judgment on the merits of a constitutional claim, necessary to the decision reached by the state court, is entitled to preclusive effect. See, e.g., *Winters* v. *Lavine, supra; Fernandez* v. *Trias Monge,* 586 F.2d 848 (1st Cir. 1978). Petitioners would agree that the judgment ought to be on the merits, but an inquiry into the "necessity" of resolution of the constitutional issue is probably unwise, except where the state criminal judgment rests on a guilty plea.[9]

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[9]An important question is raised where - unlike the case at bar - the §1983 plaintiff, either through a guilty plea or otherwise, has not *actually* litigated the constitutional claim he subsequently seeks to raise in the federal suit. See, e.g., *Brazzell* v. *Adams,* supra; see also *Prosise* v. *Haring,* —F.Supp. — (E.D.Va. 1979), appeal pending, 4th Cir. No. 79-6310; cf. *Metros* v. *United States District court,* supra. In such cases, it would seem advisable to inquire whether the constitutional claim, if raised successfully, could have materially affected the result. If so, the failure to raise the claim or to expressly reserve it, cf. *England* v. *Louisiana Medical Examiners,* supra, must estop the claimant from relitigating it in federal court under principles of collateral

The final question is "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana* v. *United States, supra,* 440 U.S. at 162. This Court has identified three general exceptions: (1) the exception which obtains for unmixed questions of law in successive actions involving substantially unrelated claims; (2) the case of the litigant who has properly invoked federal jurisdiction to consider federal claims, and who is then remitted to a state court and compelled, without his consent, to accept a state court's determination of those claims, *England* v. *Louisiana Medical Examiners, supra;* and (3) manifest unfairness or inadequacy in the state procedures involved. 440 U.S. 162-64. The lattermost question is of course crucial, since the policy of §1983 clearly envisages federal review of constitutional claims when the state remedy is adequate in theory but unavailable in practice. *Monroe* v. *Pape, supra,* 365 U.S. 174. It will always be answered when the federal court decides if the constitutional claim previously decided by the state court was fully and fairly litigated. The other exceptions will probably be of little moment in §1983 cases following state criminal judgments.

The principles outlined above are already being applied by the majority of the inferior federal courts, and their adoption by this Court will further the important interests underlying *Stone* v. *Powell* and the many other decisions which restrict the "fine opportunities for needlessly multiplying litigation" afforded by our federal system.[10] *Angel* v. *Bullington, supra,* 330 U.S. 192.

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estoppel. See *Angel* v. *Bullington,* supra; *Brazzell* v. *Adams,* supra. Of course, a counseled guilty plea could also be deemed a waiver of most constitutional claims. Compare *Menna* v. *New York,* 423 U.S. 61 (1975) with *Tollett* v. *Henderson,* 411 U.S. 258 (1973).

[10]It may perhaps be argued that the interests underlying the federal law of preclusion are regularly sacrificed in federal habeas corpus litigation, see, e.g., *Townsend* v. *Sain,* 372 U.S. 293 (1963), and the concern for federal rights evinced in such cases is readily transferable to §1983 actions. Such an argument would be misdirected, for the

Law enforcement officers will not be placed in the anomalous position of being mulcted by federal courts for actions which had previously been held lawful by state courts. The already monstrous volume of civil rights litigation will not be exacerbated by innumerable new claims of illegal search, brought by prisoners who no longer enjoy the medium of habeas corpus to clog the federal courts with largely frivolous claims. Above all, meritorious claims, such as those alleged in *Monroe* v. *Pape, supra,* will not be affected in the slightest, and will in fact benefit from the likelihood of receiving quicker and more effective attention from the District Courts.

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primary interest to be vindicated in habeas corpus is the right of the individual to be free from actual confinement in violation of constitutional rights, and so an exception to general preclusion principles can be justified, despite the societal costs in terms of lack of finality of judgments. See Vestal & Coughenour, *supra,* 19 Vand.L.Rev. at 716; cf. *Brown* v. *Allen,* 344 U.S. 443 (1953). Similarly, the lack of preclusive effect of state criminal judgments in federal *criminal* proceedings is in no wise anomalous. See, e.g., *United States* v. *Smith,* 595 F.2d 1176 (9th Cir. 1979); *United States* v. *Agee,* 440 F.Supp. 614 (E.D.Pa. 1977). Although the same act can be both a state crime and a federal crime, the state courts simply do not enjoy concurrent jurisdiction over federal crimes, whereas they could entertain a §1983 claim in the first instance. See, e.g., *Shapiro* v. *Columbia Union Nat. Bank & Trust Co.,* 576 S.W.2d 310 (Mo. banc.), cert. denied, 100 S.Ct. 60 (1979). When the state court does not properly have jurisdiction of the case in which a federal claim is raised, no preclusive effect need be accorded its judgment. Cf. *Rooker* v. *Fidelity Trust Co., supra; Spatt* v. *New York,* 361 F.Supp. 1048 (E.D. N.Y. 1973) (three-judge court), aff'd mem., 414 U.S. 1058 (1973).

II. THE COURT OF APPEALS MUST BE REVERSED BECAUSE, AS A MATTER OF LAW, RESPONDENT IS ESTOPPED TO MAINTAIN HIS ACTION UNDER 42 U.S.C. §1983 ON THE BASIS OF THE SAME CLAIM OF UNLAWFUL SEARCH WHICH THE RECORD INDISPUTABLY SHOWS TO HAVE BEEN RAISED, FULLY AND FAIRLY LITIGATED, AND DECIDED ADVERSELY TO HIM IN A PRIOR STATE CRIMINAL PROCEEDING.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. Respondent's complaint and cross-motion for summary judgment, allowing for the liberal construction of *pro se* pleadings, see *Estelle* v. *Gamble,* 429 U.S. 97 (1976), reveal that the gravamen of his claim is the warrantless intrusion into his home. See Pet. Cert., A-22, paragraphs 6 and 7, A-23, A-31, paragraph 3. The authenticated copy of the Respondent's motion to suppress and the state trial court's judgment thereon, id., A-26 - A-29, demonstrates beyond peradventure that Respondent, with the assistance of counsel, raised an identical claim of unlawful search in his state court proceeding, A-28, a hearing was held, and the warrantless search of Respondent's home was held to be constitutional. There is no dispute that this ruling was part of a state proceeding resulting in a final judgment of conviction of Respondent for possession of heroin and assault. Compare id., A-22, paragraph 5, with A-13. In the courts below, Respondent has never contended that the state proceedings suffered from any procedural irregularity or unfairness; he is dissatisfied only with the result.

Viewing the record of this case in light of the appropriate principles of federal collateral estoppel discussed above, one must conclude that the District Court's judgment was correct. Respondent directly placed in issue before the state court the

same claim of unlawful search which he has alleged in his complaint under 42 U.S.C. §1983. The claim was fully and fairly litigated, and actually and necessarily[11] determined by the state court, which properly had jurisdiction of the case. The judgment of the state court was adverse to Respondent. Thus, all of the ingredients for application of federal collateral estoppel are present. See *Montana* v. *United States, supra; Winters* v. *Lavine, supra; Mastracchio* v. *Ricci, supra; Metros* v. *United States District Court, supra; Rodriguez* v. *Beame, supra.* The addition of allegations concerning conspiracy (Pet. Cert. A-21) avails Respondent nothing: the conspiracy claim falls once the legality of the search is established. Cf. *Mosher* v. *Saalfeld,* 589 F.2d 438 (9th Cir.), cert. denied, 99 S.Ct. 2883 (1979); *Smith* v. *Sinclair,* supra, 424 F.Supp. at 1113-14.

Respondent has intimated that, assuming collateral estoppel applies to §1983 actions, it does not operate as a bar to his claim, because the decision of the state court was not adverse to him. Indeed, Respondent suggests that collateral estoppel in this case could operate "offensively" to estop Petitioners from denying illegality of the search of his home. See Brief Opposing Certiorari, pp. 5-7.

The former contention must turn upon a construction of the pleadings. It is true that the state court suppressed the evidence which was found hidden in drawers or among tires. Pet. Cert., A-27. If the complaint here can be read as alleging that the Petitioners conspired to conduct, and did conduct, a search which was illegal in scope, then perhaps Respondent is not estopped.

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[11]Items seized during the search included drugs in plain view. Pet. Cert., A-27. Use of this evidence was obviously necessary to convict Respondent of the offense of possession. Compare *Jones* v. *Bales,* 58 F.R.D. 453 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973), in which items were seized but not offered in evidence in the state proceeding, so the state court never had occasion to rule on the validity of the search.

However, such a strained construction of the pleadings is not warranted, and was indulged in by neither the District Court nor the Court of Appeals. 466 F.Supp. 515, Pet. Cert., A-3; 606 F.2d 797, Pet. Cert., A-6. Respondent himself asserted in his complaint that "it is crystal clear that the Defendants acted in a conspiracy to violation of [sic] the U.S. Constitutional Rights of the Plaintiff to search his house without a search warrant, when in fact the Defendants could easily have secured the house and then obtained a search warrant from a judge." Pet. Cert., A-23. There can be little doubt that Respondent was keenly aware that a claim for the seizure of the items (including drugs) which were suppressed by the state court would furnish no basis for liability in damages on the part of Petitioners, see *Carey* v. *Piphus,* 435 U.S. 247 (1978), *Mastracchio* v. *Ricci,* supra, 498 F.2d at 1262; so he chose to rest his claim instead on the alleged illegality of the warrantless intrusion into his home - the same claim that was presented to the state court and necessarily rejected, notwithstanding suppression of *some* of the items seized.

As for the "offensive" use of collateral estoppel, Petitioners would note that such an application of the doctrine is largely confided to the discretion of the trial court, subject to the qualification that such use is not permitted where its operation would be unfair to the defendant; and it is possible that estoppel of a party who never appeared in the prior action, or never directly controlled litigation of the issue, would not be consonant with due process. Compare *Parklane Hosiery Co.* v. *Shore, supra,* 439 U.S. at 326, with *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* 402 U.S. at 324; see also *Henderson* v. *Goeke,* 329 F.Supp. 1160 (E.D. Pa. 1971), aff'd mem., 491 F.2d 749 (3d. Cir. 1973). Moreover, while Petitioners would acknowledge that there is no absolute barrier to "offensive" use of collateral estoppel in §1983 actions, such use would be of little practical moment, for law officers who are defendants in §1983 cases would nonetheless retain their right to assert their "good faith-

reasonable belief" defense, and a trial would almost always be in order on that issue. See *Pierson* v. *Ray, supra;* see also *Gomez* v. *Toledo,* 602 F.2d 1018 (1st Cir. 1979), cert. granted, 48 USLW 3451 (Jan. 15, 1980) (bad faith and malice must be pleaded and proved by §1983 plaintiff).

In summary, the Court of Appeals erred in refusing to recognize and apply appropriate federal principles of collateral estoppel to this case. Had those principles been properly applied, the District Court would have been affirmed in granting partial summary judgment for Petitioners on the claim of unlawful search and seizure. This is not a case in which the constitutional rights of Respondent are being "balanced" against "other interests." Respondent's constitutional rights are not at issue; those rights have been accorded full and fair attention in his criminal case. The issue here is whether Respondent is entitled to more than one full and fair opportunity to litigate the same claim, which happens to be a claim of constitutional violation. The answer is emphatically *no*. Fairness to defendants and to plaintiffs with meritorious §1983 claims alike demands that neutral principles of collateral estoppel apply to §1983 cases as much as to any other federal case. But the cry will be heard, must not violations of federally protected rights be deterred? Yes, but is there any deterrent effect when two courts of competent jurisdiction reach diametrically opposite results on the basis of the same law and the same facts? Federally protected rights do not, can not, suffer when persons are foreclosed from relitigating alleged violations *ad infinitum*. Needless, duplicative litigation helps no one, and may do a great deal of harm; the general welfare demands that a period be put to litigation. Further commentary would be superfluous.

CONCLUSION

The judgment of the Court of Appeals must be reversed, and the case remanded either for entry of judgment in accordance with the District Court's order insofar as it granted partial summary judgment, or, in the alternative, for reconsideration in light of the established federal rules of collateral estoppel applicable to §1983 actions, which the Court of Appeals ought not to have disregarded.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN ALLEN, STEVEN JACOBSMEYER, UNKNOWN POLICE OFFICERS, AND THE CITY OF ST. LOUIS POLICE DEPARTMENT, *Petitioners,*

v.

WILLIE MCCURRY, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENTS 4

ARGUMENTS 9

I. The Court Of Appeals Was Correct In Holding Collateral Estoppel Inapplicable In Actions Under 42 U.S.C. § 1983 Alleging Fourth Amendment Violations Because: (1) Collateral Estoppel Is An Inappropriate Doctrine In Such Actions In Light Of The Civil Rights Act Of 1871's Legislative History And The Importance Of The Rights Protected Thereunder: And, (2) This Court's Decision In *Stone* v. *Powell*, 428 U.S. 465 (1976) Eliminated Habeas Corpus As A Remedy For Fourth Amendment Claims Litigated In State Courts, Thus Leaving Individuals In Respondent's Position Without Any Means To Obtain A Viable Federal Forum Other Than Section 1983 9

A. Section 1983's Legislative History Clearly Requires That Respondent Be Provided With A Federal Forum For His Fourth Amendment Claim, Unencumbered By The Doctrine Of Collateral Estoppel 9

B. The Opinion Of The Court Of Appeals Is Consistent With *Stone* v. *Powell*, 428 U.S. 465 (1976) And Lower Court Decisions Holding Collateral Estoppel Applicable In Section 1983 Action Prior To Stone 9

C. Petitioner's Interpretation As To The Applicability Of Collateral Estoppel Would Deny A Federal Forum To Litigants With Meritorious Fourth Amendment Claims, Thereby Contravening Section 1983's Intent And Purpose 26

D. General Principles Of Tort Law Are Not Determinative Of The Issues In This Case . 31

Table of Contents Continued

PAGE

E. The Decision Below Gives Appropriate Consideration To Federal-State Comity ... 32

F. The Federal Res Judicata Act, 28 U.S.C. § 1738 Is Inapplicable Under The Facts Of This Case 34

II. Respondent's Claim Is Serious And Substantial And Evinces State Court Unwillingness To Advance To Federal Court Holdings On Fourth Amendment Issues 36

III. Notwithstanding The Unavailability Of Federal Habeas Corpus, Collateral Estoppel Is Inapplicable In The Instant Case As Concerns The Basic Allegations In Respondent's Complaint Because (1) The State Court Held That Respondent's Fourth Amendment Rights Were Violated: And, (2) No Court Has Considered Plaintiff's Assault Claim 40

CONCLUSION 49

TABLE OF AUTHORITIES

CASES: PAGE

Alexander v. *Emerson*, 489 F.2d 285 (5th Cir. 1973) 17

American Mannex Corp. v. *Rozands*, 462 F.2d 688 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) 7, 35

Ames v. *Vavreck*, 356 F.Supp. 931 (D.Minn. 1973) 47

Birnbaum v. *Trussell*, 371 F.2d 672 (2d Cir. 1966) 47

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 20

Brazzell v. *Adams*, 493 F.2d 489 (5th Cir. 1974) 21

Brewer v. *Williams*, 430 U.S. 387 (1977) 22-23

Brown v. *Chastian*, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) 21

Brown v. *DeLayo*, 498 F.2d 1173 (10th Cir. 1974) 21

Brubaker v. *King*, 505 F.2d 534 (7th Cir. 1974) 24

Carey v. *Piphus*, 435 U.S. 247 (1978) 8, 44, 45

Chimel v. *California*, 395 U.S. 752 (1969) 39

Clark v. *Lutcher*, 436 F.Supp. 1266 (M.D.Pa. 1977) .. 25, 28

Cohens v. *Virginia*, 19 U.S. (6 Wheat) 262 (1831) 28

Collum v. *Butler*, 421 F.2d 1257 (7th Cir. 1970) 47

Corboy v. *Conboy*, 457 F.2d 251 (2d Cir. 1972) 42

England v. *Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 30

Ex parte Virginia, 100 U.S. 339 (1880) 10

Florida State Bd. of Dentistry v. *Mack*, 401 U.S. 960 (1971) 16

Hahn v. *Sargent*, 388 F.Supp. 445 (D.Mass. aff'd. 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) 47

Haines v. *Kerner*, 404 U.S. 519 (1972) 42

Table of Authorities Continued

CASES: PAGE

Hammer v. *Town of Greenburgh*, 440 F.Supp. 27 (S.D.N.Y. 1977), aff'd without opinion, 578 F.2d 1368 (2d Cir. 1978) 21

Harrison v. *NAACP*, 360 U.S. 167 (1959) 5, 14, 15

Hostrop v. *Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) 45

Imbler v. *Pachtman*, 424 U.S. 409 (1976) 31

Kauffman v. *Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970) 21

Lauchli v. *United States*, 405 U.S. 965 (1972) 16

Lyons v. *Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) 35

Martin v. *Delcambre*, 578 F.2d 1164 (5th Cir. 1978) 21

Mastracchio v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974) ... 18, 21 25, 43

Meadows v. *Evans*, 550 F.2d 345 (5th Cir. 1977) 25

Metros v. *United States District Court*, 441 F.2d 313 (10th Cir. 1971) 21, 23, 24

Mincey v. *Arizona*, 437 U.S. 385 (1978) 7, 8, 30, 36, 37, 38, 39, 40

Miranda v. *Arizona*, 384 U.S. 436 (1966) 22, 23

Mitchum v. *Foster*, 407 U.S. 225 (1972) 5, 10, 11, 13, 14, 15, 31, 32, 36

Monell v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) 46

Monroe v. *Pape*, 365 U.S. 167 (1961) 10, 14, 47

Montana v. *United States*, 440 U.S. 147 (1979) 7, 31-32

Ney v. *California*, 430 F.2d 1285 (9th Cir. 1971) 29

Owens v. *Independence*, _____ U.S. _____, 100 S.Ct. 1398 (1980) 4, 9, 10, 19, 31, 46

Table of Authorities Continued

CASES: PAGE

Palma v. *Powers*, 295 F.Supp. 924 (N.D.Ill. 1969) 21, 24

Paul v. *Davis*, 424 U.S. 693 (1976) 31

Phillips v. *Trello*, 502 F.2d 1000 (3d Cir. 1974) 46

Pierson v. *Ray*, 386 U.S. 547 (1967) 6, 27, 29

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 16

Red Fox v. *Red Fox*, 564 F.2d 361 (9th Cir. 1977) 35

Rimmer v. *Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) 17, 18, 21, 25

Rodriguez v. *Beame*, 423 F.Supp. 906 (S.D.N.Y. 1976) 22, 23

Rosenberg v. *Martin*, 478 F.2d 529 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973) 47

Sexton v. *Gibbs*, 327 F.Supp. 134 (N.D.Tex. 1970), aff'd., 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) 45

Smith v. *Sinclair*, 424 F.Supp. 1108 (W.D.Okl. 1976) . 21, 22

Stone v. *Powell*, 428 U.S. 465 (1976) ..... *passim*

Thistlethwaite v. *New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) 17, 21

United States v. *Carter*, 522 F.2d 666 (D.C.Cir. 1975) ... 39

United States v. *Gamble*, 473 F.2d 1274 (7th Cir. 1973) . 39

United States v. *Young*, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977) 8, 39, 40

Winters v. *Lavine*, 574 F.2d 46 (2d Cir. 1978) 21

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV, § 1 ..... 10, 15, 37

28 U.S.C. § 1738 ..... 7, 34, 35, 36

28 U.S.C. § 2254 25

Table of Authorities Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS: PAGE

28 U.S.C. § 2283 ..... 13, 36

Fed. R. Civ. P. 12(b)(6) 6, 27

Fed. R. Civ. P. 56 ..... 6, 27

Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 (1970) ..... *passim*

LEGISLATIVE HISTORY:

Cong. Globe, 42nd Cong., 1st Sess..... 5, 11, 12, 13, 31

OTHER AUTHORITIES:

McCormack, *Federalism and Section 1983: Limitation on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va. L. Rev. 250 (1974) 30

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Comment, *Collateral Estoppel in Section 1983 Actions After Stone* v. *Powell: McCurry* v. *Allen*, 64 Minn. L. Rev. (forthcoming, June, 1980) 10

Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U. Ill. L. F. 95 (1975) 14

Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 53 Va. L. Rev. 1360 (1967) 35

No. 79-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN ALLEN, STEVEN JACOBSMEYER, UNKNOWN POLICE OFFICERS, AND THE CITY OF ST. LOUIS POLICE DEPARTMENT, *Petitioners,*

v.

WILLIE MCCURRY, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On July 17, 1978, respondent filed a claim under section 1983 of the Civil Rights Act of 1871 (42 U.S.C.

§ 1983 (1970)) for damages against individual police officers, unknown police officers, and the City of St. Louis Police Department alleging the following violations of his constitutional rights: (1) the police officers conspired to conduct an illegal search of his home; (2) his home was illegally searched; and (3) he was assaulted by police officers upon being arrested. 606 F.2d at 797 (Petition for Certiorari, A-5-A-6; A-21) (hereinafter Pet. Cert.).[1]

In response thereto, petitioners filed their Motion to Dismiss and Motion for Partial Summary Judgment. (Pet. Cert. A-25). The District Court granted respondent's motion for summary judgment, dismissing

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[1] Because this case is proceeding without an Appendix, citations will be to the appendices to the petition for certiorari and/or directly to original documents in the record. Respondent is proceeding *in forma pauperis* and with appointed counsel from the Court of Appeals. Therefore, this Honorable Court is having respondent's brief printed from a manuscript prepared by counsel. Respondent is, of course, most grateful and is quite sure the printing office will do its normal excellent job. However, his counsel will be unable to examine page proofs before this brief is filed and would like to apologize in advance for any typographical errors which may turn up in this brief.

respondent's entire complaint with prejudice on the grounds that:

> [T]he only issue in the instant lawsuit — whether the entrance into plaintiff's home and the resulting search was lawful — was litigated on the merits at his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search.

466 F. Supp. at 515-16 (Pet. Cert., A-3)

In reaching its determination, the District Court relied upon an order issued by the Circuit Court of the City of St. Louis, State of Missouri. This order dealt with respondent's motion to suppress evidence filed in his state court criminal trial and circumstantially related to the fourth amendment violation he alleges in his federal court section 1983 action. The state court sustained plaintiff's motion for suppression in part, and denied it in part. Substantively, the state court's order reads:

> "Defendant's Motion to Suppress heard and submitted and overruled in part and sustained in part as follows:
>
> "(a) Motion to suppress overruled as to those items found in plain view such as a gun and drugs on a dresser top, and a shotgun.

"(b) Motion sustained as to drugs and items found in drawers or among tires are suppressed."

(Pet. Cert., A-27).

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court, concluding that "because of the special role of federal courts in protecting civil rights . . . and because habeas corpus is now unavailable to [respondent], *see Stone* v. *Powell*, 428 U.S. at 492-94 and n.37, it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, [respondent's] § 1983 claims." 606 F.2d at 799 (Pet. Cert., A-10 - A-11). The Court specifically limited its holding to illegal search and seizure claims brought under section 1983 by persons denied federal habeas corpus relief under *Stone*. 606 F.2d at 798 (Pet. Cert., A-19).

SUMMARY OF ARGUMENT

Respondent submits that the Court of Appeals correctly held collateral estoppel inapplicable in the instant action.

I.

Section 1983's statutory language and legislative history are unequivocal. The statute admits of no defenses on its face. *Owens* v. *Independence*, _____U.S._____, _____, 100 S.Ct. 1398, 1407 (1980). Its legislative history establishes a clear congressional intent to provide complainants alleging violations of their civil rights with a federal forum, "State authorization in the premises to

the contrary notwithstanding." Cong. Globe, 42d Cong., 1st Sess., 416 (1871) (Representative Biggs). It is also clear that the remedy provided by section 1983 extends to the actions of state courts. *Mitchum* v. *Foster,* 407 U.S. 225, 241-2 (1972). Congress simply determined that the state courts standing alone were unable to adequately protect federally created civil rights, and Congress never altered its intent to make the federal courts the guarantors of basic federal rights against state power. *Mitchum* v. *Foster, supra,* 407 U.S. at 239; *Harrison* v. *NAACP,* 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting).

State courts act through their judgments and rulings. Since section 1983 clearly extends to the actions of state courts, such judgments and rulings cannot possibly estop a federal court in a section 1983 action. To hold collateral estoppel applicable in such cases would clearly subvert the congressional intent underlying section 1983.

Nonetheless, certain federal courts have applied collateral estoppel in section 1983 actions. The better reasoned of these cases have premised the applicability of collateral estoppel on the availability of federal habeas corpus relief. Although perhaps in conflict with section 1983's legislative history, this approach is at least logically sound since habeas corpus provides a federal forum and thereby satisfies the congressional intent underlying section 1983. The decision below is consistent with such cases because the Court of Appeals premised its refusal to apply collateral estoppel on the unavailability of federal habeas corpus for search and

seizure claims under *Stone* v. *Powell*, 428 U.S. 465 (1976). Following *Stone*, section 1983 is respondent's only viable avenue into federal court. No other Circuit has addressed the collateral estoppel issue in this context.

If collateral estoppel is held to apply in the instant case, criminal defendants compelled into state court will be forced to choose between litigating their fourth amendment claims in state court or increasing the possibility of conviction by holding such claims back for litigation in a subsequent section 1983 federal action. Congress intended to grant complainants a federal forum through section 1983, not a Hobson's choice between federal court and a state conviction.

Holding collateral estoppel inapplicable in the instant case should not open the floodgates of litigation. The Court of Appeals limited its opinion to a restricted group of cases in which there is a special need after *Stone* for access to a federal forum. The Federal Rules of Civil Procedure contain adequate means for dealing with frivolous claims. *See* Fed. R. Civ. P. 12(b) (6) & 56. Police officers acting with a good faith reasonable belief in the legality of their actions need not fear vexatious lawsuits under section 1983 because they will have qualified immunity. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967). However, to hold collateral estoppel applicable in the instant case would preclude meritorious claims from reaching the federal courts, thereby subverting the congressional intent underlying section 1983. As concerns respondent's claim, the Court of Appeals

characterized it as "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

Moreover, to hold collateral estoppel inapplicable would comport with doctrines of federal-state comity. Section 1983 simply provides a damages remedy, it does not overturn state court criminal convictions, release the guilty, or require a new trial.

General principles of tort law or rules of preclusion as evinced by *Montana* v. *United States*, 440 U.S. 147, 153-4 (1979) and 28 U.S.C. § 1738 are inapplicable in the instant case because the special circumstances set forth above arising from the nature of section 1983 require an exception to such general rules of preclusion. Both *Montana, supra,* 440 U.S. at 155, and cases interpreting section 1738 (*See, e.g., American Mannex Corp.* v. *Rozands,* 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) recognize the appropriateness of such exceptions.

Thus, the Court of Appeals decision is well founded and should be affirmed.

II.

As an additional point in support of the need for a federal forum to protect fourth amendment rights, respondent notes that the state court's opinion admitting certain evidence at respondent's trial and as affirmed by the Missouri Court of Appeals is in conflict with federal constitutional pronouncements both by this Court in *Mincey* v. *Arizona,* 437 U.S. 385 (1978) and the Eighth

Circuit in *United States* v. *Young*, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977). In the instant case, Officer Brand, the "seizing officer" (606 F.2d at 796 (Pet. Cert., A-5), was permitted to enter respondent's home based on a murder scene exigent circumstances rationale, after any apparent exigencies had subsided, specifically to conduct a search for evidence, not a search for occupants. At the time Officer Brand conducted this search, there were approximately thirty-five officers at the scene to guard against the loss or destruction of evidence, had the police decided to obtain a warrant. Yet, no warrant was sought or granted. This is exactly the kind of search this Court held unconstitutional in *Mincey* and the Eighth Circuit held unconstitutional in *Young*.

III

Even apart from the foregoing, respondent has an action against petitioners for an unconstitutional search and seizure under section 1983 unimpeded by collateral estoppel because the state court suppressed certain evidence. (Pet. Cert., A-27). Unquestionably, as the record stands, there was illegal search of respondent's home, and the state court so held. Whether respondent can recover damages for this search is, of course, a matter for trial. However, there is no question but that respondent can at least recover nominal damages. *Carey* v. *Piphus*, 435 U.S. 247 (1978).

ARGUMENT

I. The Court Of Appeals Was Correct In Holding Collateral Estoppel Inapplicable In Actions Under 42 U.S.C. § 1983 Alleging Fourth Amendment Violations Because: (1) Collateral Estoppel Is An Inappropriate Doctrine In Such Actions In Light Of The Civil Rights Act Of 1871'S Legislative History And The Importance Of The Rights Protected Thereunder: And, (2) This Court's Decision In *Stone v. Powell*, 428 U.S. 465 (1976) Eliminated Habeas Corpus As A Remedy For Fourth Amendment Claims Litigated In State Courts, Thus Leaving Individuals In Respondent's Position Without Any Means To Obtain A Viable Federal Forum Other Than Section 1983.

A. Section 1983'S Legislative history clearly requires that respondent be provided with a federal forum for his Fourth Amendment claim, unencumbered by the Doctrine of Collateral Estoppel.

Section 1983's statutory "language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owens* v. *Independence*, _____ U.S. _____, _____, 100 S. Ct. 1398, 1407 (1980). It unequivocally imposes liability upon "every person" who, under color of state law or custom "subjects, or causes to be subjected, any citizen of the United States . . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983 (*See* Petitioner's Brief, p.3) (Hereinafter Pet. Br.).

Because the applicability of any particular defense in section 1983 actions is a matter of statutory interpretation, the Civil Rights Act's legislative history is of particular import. *See Owens* v. *Independence,* _____, _____, 100 S. Ct. 1398, 1407 (1980). Section 1983 was originally enacted as section 1 of the Civil Rights act of 1871. 17 Stat. 13. It was specifically designed to enforce the fourteenth amendment and thereby establish "the role of the Federal Government as the guarantor of basic federal rights against state power. . . ." *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). Section 1983's legislative history plainly establishes that Congress enacted this legislation to provide a federal forum for litigants in respondent's position to protect their federally guaranteed constitutional rights. *See Monroe* v. *Pape,* 365 U.S. 167, 180 (1961). *See generally* Comment, *Collateral Estoppel in Section 1983 Actions After Stone* v. *Powell: McCurry* v. *Allen,* 64 Minn. Rev. (forthcoming June, 1980).

This Honorable Court has expressly noted that

> [i]t is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or *judicial.*" Ex parte Virginia, 100 U.S. 339, 346, 25 L..Ed. 676 (emphasis supplied). Proponents of the legislation

> noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

Mitchum v. *Foster, supra*, 407 U.S. at 240.

Various statements by the legislators involved in the Civil Rights Act's enactment leave no doubt that, as noted by this Court in *Mitchum* v. *Foster, supra,* 407 U.S. at 238-42, Congress was concerned with the inability of state courts to protect individual rights and intended to place responsibility for the ultimate protection of such rights in the federal courts. As stated by Representative Lowe, the

> records of the [state] tribunals are searched in vain for any evidence of effective redress [of federally secured rights] . . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to observe and protect the rights, privileges and immunities of citizens. . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.

Cong. Globe, 42d Cong., 1st Sess., 374-6 (1871) (hereinafter Cong. Globe).

Representative Perry stated:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.

Cong. Globe at App. 78.

Representative Kerr, speaking in opposition to the Civil Rights Act's passage, stated that section 1983's predecessor

> gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in Federal courts.

Cong. Globe at App. 50.

Senator Thurman, speaking in the same vein, stated that section 1983's predecessor

> authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this sec-

> tion jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

Cong. Globe at App. 216.

Representative Coburn stated most eloquently:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . .We believe we can trust our United States courts, and we propose to do so.

Cong. Globe at 460.

In describing the Act, Representative Biggs seems to have been addressing the very issue of collateral estoppel when he stated:

> First, for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding.

Cong. Globe at 416

The congressional debates over section 1983's predecessor were not even about whether the Act "extended to actions of state courts, but whether this innovation was necessary or desirable." *Mitchum* v. *Foster, supra,* 407 U.S. at 241-2 (footnote omitted).

Thus, this Court has held that 28 U.S.C. § 2283, which is an absolute bar to injunctions against state

court proceedings in most suits, does not apply to a suit brought under section 1983 seeking to enjoin state court proceedings. *Mitchum* v. *Foster, supra,* 407 U.S. at 242-3. In so holding, the Court concluded that section 1983's legislative history

> makes evident that Congress clearly conceived that it was altering the relationship between the State and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights, it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Mitchum v. *Foster, supra,* 407 U.S. at 242. *See also, Monroe* v. *Pape,* 365 U.S. 167, 172-83; *Harison* v. *NAACP,* 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 Nw. L. Rev. 859, 866-68 (1976); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions,* 1975 U. Ill. L.R. 95, 98-99 (1975).

Contrary to petitioner's assertion that section 1983's legislative history "is probably best described as equivocal" (Pet. Br., p. 19) the foregoing sources make it evident that the Congress which passed section 1983 had little faith in the ability of state courts to fairly adjudicate federal constitutional claims, and that it specifically intended to provide a federal remedy to protect such rights even where adequate state remedies existed. Congressional concern was centered on the protec-

tion of individual rights, not federalism, judicial resourses, comity, the federal case load, or other policies underlying the doctrine of collateral estoppel.

Congress has never altered its intent to make federal courts the primary protectors of constitutional rights through section 1983. As noted by Justice Douglas:

> The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today, the fact remains that there has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

Harrison v. *NAACP*, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting).

Given section 1983's unequivocal legislative history, it is difficult to see how any question would arise as to whether a state court decision on constitutional issues could have collateral estopel effect in a federal court action under section 1983. Congress plainly intended that section 1983 would extend to state court actions involving federally protected constitutional rights. *Mitchum* v. *Foster, supra* 407 U.S. at 241-2. State courts act through their judgments and rulings. How then can a state court

judgment or ruling on issues involving federally protected constitutional rights estop a federal court in an action under section 1983. Clearly, if congressional intent is to be fulfilled, collateral estoppel is wholly inapplicable under these circumstances.

Various Supreme Court Justices have, in fact, indicated that traditional notions of collateral estopel and *res judicata* may be inapplicable in Civil Rights Act cases; while no Supreme Court case has directly held these doctrines applicable. *See Preiser* v. *Rodriquez,* 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting with Douglas, J., and Marshall, J., joining in dissent); *Lauchli* v. *United States,* 405 U.S. 965, 965-8 (1972) (Douglas, J., dissenting from denial of certiorari); *Florida State Bd. of Dentistry* v. *Mack,* 401 U.S. 960, 961-2 (1971) (White dissenting from denial of certiorari with Burger, C.J., joining in dissent).

B. The opinion of the Court of Appeals is consistent with *Stone* v. *Powell,* 428 U.S. 465 (1976) and lower court decisions holding collateral estoppel applicable in section 1983 action prior to Stone.

Notwithstanding the foregoing unequivocal legislative history, many federal courts have held collateral estoppel applicable in actions under section 1983. The courts that considered section 1983's legislative history often expressly qualified their holdings on the availability of an alternative federal forum for section 1983 complainants through habeas corpus. *See, e.g.,*

Rimmer v. *Fayetteville Police Dept.*, 567 F.2d 273, 276 (4th Cir. 1977); *Thistlethwaite* v. *New York,* 497 F.2d 339, 343 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974); *Alexander* v. *Emerson,* 489 F.2d 285, 286 (5th Cir. 1973)(per curiam); *Moran* v. *Mitchel* 354 F. Supp. 86 (E.D. Va. 1973).

For example, in *Moran* v. *Mitchell,* 354 F. Supp. 86 (E.D. Va. 1973), the plaintif was arrested and convicted on the basis of evidence obtained in a search of is car. The state court denied his motion to suppress, and the appellate court denied him leave to appeal. Plaintiff then brought a section 1983 suit for damages and simultaneously petitioned the federal district court for a writ of habeas corpus. The section 1983 suit defendants moved for summary judgment asserting the collateral estoppel effect of the state court judgment. *Id.* at 87.

The Court noted that to apply collateral estoppel in a section 1983 suit puts state criminal defendants to a "Hobson's choice." *Id.* at 88. If such a defendant contests this constitutionality of a search at the state level, then he may not sue for damages in federal court if his motion to suppress is overruled. However, if he preserves the issue for a federal damages action, he increases the possibility of conviction. *Id.*

The Court also expressed "some doubt" as to the applicability of collateral estoppel in section 1983 cases. *Id.* This doubt stemmed "from the clear congressional purpose behind the Civil Rights Act of providing a federal remedy to litigants who possess a state remedy in theory, but not in practice." *Id.* However, the court

found that in this case federal habeas corpus available to "satisfy the congressional concerns behind the Civil Rights Act." *Id.* at 89. It held that a state conviction would collaterally estop a section 1983 plaintiff only if relief by way of habeas corpus was available to him, or he had unsuccessfully challenged his conviction in a habeas proceeding. *Id.* at 89-90.

This approach to section 1983 litigation is at least logically sound, although perhaps in conflict with the above stated legislative history. Habeas corpus does provide individuals with a federal forum, thereby satisfying congressional concern that such a forum be available. Moreover, the ability to bring a habeas corpus action indirectly preserves the possibility of gaining access to a federal forum for a section 1983 action. If a criminal defendant is successful in his habeas action, the prior state judgment no longer has collateral estopel effect and he can proceed with his section 1983 action. *See Rimmer* v. *Fayeteville Police Dept.*, 567 F.2d 273, 277 (4th Cir. 1977 (dictum)); *Mastracchio* v. *Ricci,* 498 F.2d 1257, 1260 n.2 (1st Cir. 1974 (dictum)).

However, in light of this Court's decision in *Stone* v. *Powell,* 428 U.S. 465 (1976), the habeas corpus justification for applying collateral estoppel in section 1983 cases involving fourth amendment claims is no longer valid. In *Stone* this Court held that where a state court "has provided an opportunity for full and fair litigation of Fourth Amendment claims," relief by way of habeas corpus is unavailable since the deterrent effect of such relief on unlawful police conduct is minimal.

428 U.S. at 494-96. Since, under *Stone,* habeas corpus is no longer available to the great majority of state criminal defendants alleging fourth amendment violations, the Court below held collateral estoppel inapplicable in the instant case. 606 F.2d at 799 (Pet. Cert. A-10, A-11).

Petitioners have alleged that the opinion below is in conflict with this Court's holding in *Stone,* emphasizing comments in *Stone* as to limited judicial resources, judicial economy, and federal-state comity. (Petitioners' Brief, p.27) (hereinafter Pet. Br.). It is in this respect that petitioners most seriously misread not only *Stone,* but section 1983's purpose and legislative history.

Clearly, this Court's major concern in *Stone* was whether relief by way of habeas corpus in cases involving alleged violations of fourth amendment rights furthered the "primary justification" for the exclusionary rule, *i.e.,* deterrence of illegal police practices. 428 U.S. at 486. It rejected habeas corpus as a viable means for reviewing state court exclusionary rule decisions because the "additional contribution [to the deterrence justification], if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs." *Id.* at 493 (portion in brackets added). As concerns section 1983, however, this Court recently noted that it "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent as well. *Owens* v. *Independence, supra* _____U.S. at _____, 100 Ct. at 1416 (citations omitted).

The societal costs of applying the exclusionary rule which concerned this Court in *Stone* were that,

> the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

Id. at 489-90 (footnotes omitted). The major cost of the rule is, therefore, that it "deflects the truthfinding process and often frees the guilty." *Id.* at 490. A section 1983 action, however, neither "deflects the truthfinding process" nor does it "free the guilty." *Id.* at 490. It merely provides a damage remedy and deterrence. Moreover, Chief Justice Burger, concurring in *Stone,* partially justified the elimination of habeas corpus relief as a remedy for fourth amendment claims on the need for alternative remedies. *Id.* at 500-01 (Burger, C.J., concurring). As indicated by the foregoing legislative history and as stated by the Court of Appeals below, "[a] § 1983 damage action is clearly one of the more obvious of such alternative remedies." 606 F.2d at 799 (Pet. Cert. A-10).[2]

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[2] However, the Chief Justice has also noted that section 1983 standing alone would be insufficient to protect fourth amendment rights. *See Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting). ("The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective.").

As to the cases cited by petitioners for the proposition that "lower federal courts have consistently recognized the appropriateness of applying principles of res judicata and collateral estopel in § 1983 actions," (Pet. Br., p. 17), it is noteworthy that this Court decided *Stone* on June 6, 1976. Most of the cases cited by petitioners were decided prior to *Stone* and/or did not involve search-and-seizure claims. Therefore, these cases did not consider the absence of federal habeas corpus review of state court decisions on search and seizure claims.[3] Moreover, certain of the cases cited by petitioners are distinquishable from the instant case on other grounds.

For example, in *Smith* v. *Sinclair,* 424 F. Supp. 1108 (W.D. Okl. 1976), the court totally failed to ad-

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[3] *See, e.g., Martin* v. *Delcambre*, 578 F.2d 1164 (5th Cir. 1978) (no search and seizure claim); *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978) (same); *Rimmer* v. *Fayetteville Police Dept.*, 567 F.2d 273, 276 (4th Cir. 1977) (same); *Mastracchio* v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (no search and seizure claim, prior to *Stone*); *Brown* v. *DeLayo*, 498 F.2d 1173 (10th Cir. 1974) (same); *Thistlethwaite* v. *New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) (same, court applied collateral estoppel in partial reliance on availability of habeas corpus remedy); *Brazzell* v. *Adams*, 493 F.2d 489 (5th Cir. 1974) (same); *Metros* v. *United States District Court*, 441 F.2d 313 (10th Cir. 1971) (prior to *Stone*); *Kauffman* v. *Moss*, 420 F.2d 1270 (3rd Cir.), *cert. denied*, 400 U.S. 846 (1970) (no search and seizure claim, prior to *Stone*); *Brown* v. *Chastian*, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (no search and seizure claim, prior to *Stone*); *Hammer* v. *Town of Greenburgh*, 440 F. Supp. 27 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978) (no search and seizure claim); *Palma* v. *Powers*, 295 F. Supp. 924 (N.D. Ill. 1969) (prior to *Stone*).

dress the availability of a federal forum issue. However, this was appropriate in *Smith* because the plaintiff's original criminal trial had been in a federal court. 424 F. Supp. at 1110. The Court specifically noted that most of the issues plaintiff raised on appeal "were precisely the same issues presented to the federal court in his bank robbery trial and directly determined by the court adversely to him." *Id.* at 1111. The Court in *Smith* had no reason to address the issues presented in the instant case. The plaintiff in *Smith* had his federal forum, and section 1983's legislative intent to provide such a forum was satisfied.

Rodriquez v. *Beame,* 423 F. Supp. 906 (S.D.N.Y. 1976) is perhaps worthy of some note because it was decided on December 21, 1976, five months after *Stone.* However, the court makes no reference to *Stone*, nor does it discuss section 1983's legislative intent to provide a federal forum.

The plaintiff in *Rodriquez* alleged two constitutional violations: (1) an arrest without probable cause; and (2) absence of *Miranda* warnings, and the use of threats, trickery, and force in obtaining confessions. 423 F. Supp. at 907. The court found that collateral estoppel precluded relitigation of the issues decided adversly to plaintiff at his state court suppression hearing. It stated that the supression hearing held that plaintiff's confessions given after arrest and interrogation were lawful. *Id.* at 907.

Alleged violations of an individual's *Miranda* rights may still be raised by way of habeas corpus. *See Brewer*

v. *Williams*, 430 U.S. 387 (1977) (by implication). *Stone* applies only to fourth amendment claims. Thus, the court in *Rodriquez* may have considered the plaintiff's claim as basically involving *Miranda* rights and felt no need to consider *Stone* or the availability of a federal forum. This conclusion is strengthened by the court's total failure to mention plaintiff's fourth amendment arrest without probable cause claim after its initial recognition that such a claim was before it. The court never mentions whether the state court made a specific finding on plaintiff's fourth amendment claim. While it is unclear exactly what the court in *Rodriquez* considered in reaching its holding, it is clear that the court totally failed to discuss section 1983's legislative intent to provide a federal forum. Notwithstanding the foregoing, it is noteworthy that not even the court in *Rodriguez* dismissed the plaintiff's claim with prejudice, as the trial court did in the instant case. The court in *Rodriguez* dismissed the complaint with the caveat that the case would be re-opened if the suppression hearing decision was overruled. 423 F. Supp. 908. Given the availability of habeas corpus for the presentation of cases involving alleged violations of an individual's *Miranda* rights, the plaintiff in *Rodriguez* might well have had his suppression hearing decision reversed in federal court subsequent to the dismissal of his section 1983 action.

In their Petition for Writ of Certiorari, petitioners placed significant reliance upon *Metros v. United States District Court*, 441F.2d 313 (10th Cir. 1971) (Pet. Cert.,

P. 15-16). They also cite this case in their brief (Pet. Br., p. 17). As noted above, *Metros* was decided prior to *Stone* and, therefore, the Tenth Circuit could not possibly have addressed the issues resolved by the court below. Moreover, the plaintiff in *Metros* unsuccessfully sought relief in the state and federal courts prior to bringing his action under the Civil Rights Act for damages. 441 F.2d at 314. The Court in *Metros* quoted *Palma* v. *Powers*, 295 F. Supp. 924 (N.D. Ill. 1969), a section 1983 action, noting that relitigation of the issues decided by the state court was unnecessary because " 'the litigant is afforded an avenue for relief from erroneous or unjust decision in the first court by appeal or some other appropriate means of re-examination.' " 441 F.2d at 317. In *Metros*, the plaintiff had already been afforded an "appropriate means of re-examination" and a federal forum through the utilization of federal habeas corpus relief. *Id.* Respondent in the instant case will not have this opportunity if the trial court's judgment is upheld. There was also a noteworthy concurrence by Judge Holloway in *Metros*, arguing that collateral estoppel was inapplicable because the issues presented in state court were not identical to those in plaintiff's civil rights action. 441 F.2d 318-19. See also, *Brubaker* v. *King*, 505 F.2d 534 (7th Cir. 1974).

In a more recent case, cited by petitioners (Pet. Br., p. 17), the Fourth Circuit stated that it did not "see any practical problem" with applying collateral estoppel in section 1983 cases,

> as long as the state prisoner-plaintiff has or has had, access to a federal forum for the determina-

> tion of his federal constitutional claims. Most state court prisoners do have such a right of access through 28 U.S.C.A. § 2254, but there are exceptions. Under *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), state court prisoners complaining of searches and seizures would usually have no such access to a federal forum. Others may be unable to meet the "in custody" requirement of § 2254, and never could have met it. Application of the rule of preclusion by reason of a state court conviction in those cases, therefore, may deny a state court prisoner access to a federal forum entirely. Since it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases. This problem has been noted by others, including Judge Goldberg in his separate opinion in *Meadows* v. *Evans*, 550 F.2d 345 (5th Cir. 1977); by Judge Coffin in *Mastracchio* v. *Ricci*, 498 F.2d 1257, 1260 n.2 (1st Cir. 1974); by Judge Merhige in *Moran* v. *Mitchell*, 354 F.Supp. 86 (E.D.Va. 1973).

Rimmer v. *Fayetteville Police Dept.*, 567 F.2d 273, 276 (4th Cir. 1977).

The only case, other than the Eighth Circuit's opinion below, to respondent's knowledge, that discusses collateral estoppel, section 1983, and *Stone* in reaching its holding is *Clark* v. *Lutcher*, 436 F. Supp. 1266 (M.D. Pa. 1977). *Clark* held collateral estoppel inapplicable in section 1983 actions involving fourth amendment rights.

C. Petitioner's interpretation as to the applicability of collateral estoppel would deny a federal forum to litigants with meritorious fourth amendment claims, thereby contravening section 1983's intent and purpose.

Petitioners assert that "a majority, perhaps a significant majority, of § 1983 claims filed against State officials, including law enforcement officers, especially those filed by convicted and imprisoned felons, are insubstantial and even frivilous" and that should this Court fail to apply collateral estoppel in such cases "the risk will be enhanced that harassed District Judges may pay insufficient attention to meritorious claims." (Pet. Br. p.14-15). This Machiavelian approach to law enforcement sets the tenor for petitioners' entire brief (as well as the Americans for Effective Law Enforcement, *et al.*'s Amicus Curiae Brief). In effect, petitioners are asking this Court to ignore section 1983's legislative intent, and all meritorious claims that should be filed thereunder in the future, because there may also be insubstantial claims. Certainly this is not the approach to be taken by the guarantors of those rights we hold most sacred in a free society, including the right to be free from unconstitutional searches and seizures.

Moreover, there is no need to fear an onslaught of groundless civil actions. The opinion below did not create a general exception to the applicability of collateral estoppel in all section 1983 cases, but only in a restricted group of cases in which there is a special need

after *Stone* for access to a federal forum. The Federal Rules of Civil Procedure provide wholly adequate means for dealing with groundless lawsuits which might arise within this restricted group of cases. If a complainant is unable to allege facts sufficient to state a cause of action, his cause will be dismissed under Fed. R. Civ. P. 12 (b) (6). If he is unable to demonstrate the existence of any material issues of fact, summary judgment under Fed. R. Civ. P. 56 will dispose of his case.

Nor do law enforcement officers who act with a good faith-reasonable belief in the legality of their actions need fear vexatious or frivolous lawsuits. A good faith-reasonable belief in legality is a complete defense under section 183, even if the challenge conduct actually violated an individuals constitutional rights. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967). If law enforcement officers act in bad faith or without a reasonable belief in legality, they should be liable in an action under section 1983.

The real problem is that, should this Court uphold the applicability of collateral estoppel, federal district courts will be tempted to totally dismiss meritorious claims even though collateral estoppel is only arguably applicable to a portion of a cause. This is exactly what occurred in the instant case. *See* 466 F. Supp. at 515; (Pet. Cert., A-1 - A-3). Furthermore, litigants with meritorious fourth amendment claims, in which a state court decision was simply wrong, will never be provided with the federal forum contemplated by Congress in enacting section 1983. As to respondent's claim, the Court below specifically noted its meritorious nature

and characterized it as "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

Congress, through section 1983, intended to provide litigants in respondent's position with a federal forum in which to vindicate their constitutional claims. Lacking a habeas corpus remedy, section 1983 is respondent's only avenue into federal court. As stated by Chief Justice Marshall, the courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 262, 404 (1831). It would simply be unthinkable for the branch of government entrusted with the protection of individual constitutional rights to avoid hearing meritorious cases because insubstantial cases might be filed.

Moreover, as noted in *Moran* v. *Mitchell*, *supra*, 354 F. Supp. at 88 and *Clark* v. *Lutcher*, *supra*, 436 F. Supp. at 1272, state court criminal defendants who choose to litigate their fourth amendment claims in a federal forum will truly be put to a Hobson's choice should this Court hold collateral estoppel applicable in the instant case. Should this Court so hold, a state court criminal defendant with a valid fourth amendment claim will only be able to have his claim heard in a federal forum if he foregoes raising it in his state court criminal trial; thereby increasing the likelihood of his conviction. Few defendants will be willing to risk a criminal conviction on the premise that they may obtain damages in a subsequent federal action.This is especially true since, to succeed in a state court suppression hearing, the defendant need merely prove that he has standing and that

the search was unconstitutional. While in section 1983 actions, the plaintiff must not only demonstrate that he has standing and that the search was unconstitutional, he must additionally overcome the good faith-reasonable belief defense available to police officers in section 1983 actions. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967).

Given the infrequency with which individuals would bring section 1983 actions under these circumstances, and the unavailability of habeas proceedings under *Stone*, the exclusionary rule would become the sole means available to most state criminal defendants for protecting fourth amendment rights. Yet, it is clear that the exclusionary rule was never meant to supplant damage actions as a remedy for violations of fourth amendment rights. In *Ney* v. *California*, 439 F.2d 1285 (9th Cir. 1971), the Ninth Circuit directly addressed the relationship between the exclusionary rule and section 1983, stating:

> "The Civil Rights Act long antedates the exclusionary rule; the creation of that rule by the Supreme Court, first for the federal courts and later for the state courts, was not designed to, and did not, limit the remedies created by the Congress when it enacted the Civil Rights Act."

Id. at 1288. The Court further noted that if a successful state prosecution, based upon the use of information obtained in violation of defendant's constitutional rights, could bar a civil rights action against the offending officers, "the Civil Rights Act would, in many cases, be a dead letter." *Id.* It held that plaintiff's section 1983 action for denial of counsel during interroga-

tion was not barred by his prior state court conviction. *Id.*

Although this Court has indicated an unwillingness to "assume that there now exists a general lack of appropriate sensitivity to constitutional rights" in the state courts (*Stone* v. *Powell*, *supra*, 428 U.S. at 493-4 n.35), it is still pertinent to note that lacking habeas corpus review the application of the exclusionary rule is left to state judges, insulated from federal courts by the remoteness and improbability of Supreme Court review. This Court has recognized the insufficiency of such review for protecting constitutional rights. See, *England* v. *Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 416 (1964). *See also*, *Stone* v. *Powell*, *supra*, 428 U.S. at 526 (Brennen, J., dissenting); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va. L. Rev. 250, 264 (1974).

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), Justice Brennan, joined by Justice Marshall, specifically noted state court disinclination to follow "federal constitutional pronouncements" on fourth amendment issues after *Stone* eliminated federal habeas corpus review. 437 U.S. at 404. It was because of problems such as Justice Brennan noted in *Mincey* that Congress enacted section 1983 and placed guardianship of federal constitutional rights in the federal courts. To deny litigants in respondent's position the right to utilize the federal courts to protect his fourth amendment rights would clearly violate the very purpose behind section 1983's enactment.

D. General principles of tort law are not determinative of the issues in this case

It is of no avail to petitioners that section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (Pet. Br., p.15-16). Section 1983 is not a "font of tort law" nor does it create " a body of general federal tort law. . " *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). Whether any given immunity or defense applies in an action under section 1983 is essentially a question of statutory construction. *Owen* v. *Independence*, *supra*, _____ U.S. at _____, 100 S.Ct. at 1407. As stated above, section 1983's statutory language admits of no defenses and its legislative history clearly discloses congressional intent to provide complainants a federal forum for the vindication of their constitutional rights, "State authorization in the premises to the contrary notwithstanding." Cong. Globe at 416 (Representative Biggs).

Clearly, Congress intended that federal court jurisdiction under section 1983 would extend "to the actions of state courts . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 241-2 (footnote omitted). It seems quite obvious under these circumstances that the actions of state courts, i.e., their judgments and rulings, do not have traditional tort law collateral estoppel effect. In short, specific congressional intent with respect to section 1983 overrides general principles of tort law. Even the principal case cited by petitioners on this point, *Montana* v.

United States, 440 U.S. 147 (1979), notes that in applying collateral estoppel courts must first determine whether any "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155. The instant case simply presents special circmstances arising from the nature of section 1983 and requiring an exception to general rules of preclusion.

E. The decision below gives appropriate consideration to federal-state comity.

Petitioners contend that the Court of Appeals' reliance on "the special role of the federal courts in protecting civil rights" (606 F.2d 799 (Pet. Cert., A-10)), is "patently erroneous" given section 1983's legislative history and concurrent state court jurisdiction under the statute. (Pet. Cert., p.19). This Court was obviously aware of section 1983's concurrent jurisdictional provision when it recognized congressional intent under section 1983 to establish "the role of the Federal Government as a guarantor of basic federal rights against state power . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 239. Thus, the Court of Appeals' recognition of this special role can hardly be considered patently erroneous. As demonstrated above, section 1983 clearly contemplates a special role for the federal courts in protecting individual rights.

Petitioners seem to feel that it somehow helps their position to demonstrate that section 1983 provides for concurrent federal-state court jurisdiction. (Pet. Br. p.19-24). It has never been respondent's position that section 1983 deprived the state courts of jurisdiction

over constitutional issues. Surely if a plaintiff chooses to bring his section 1983 action in state court, nothing in section 1983 or its legislative history would prevent him. Respondent's contention is that Congress intended, through section 1983, to provide individuals in respondent's position with the opportunity to utilize a federal forum for the protection of their federally protected constitutional rights. This certainly does not mean that if such individuals feel their rights can be better protected in state courts they should be forced into federal courts. The choice is the complainant's under section 1983, however, not the state's.

In the instant case, respondent was compelled into the state court system. As noted above, if collateral estoppel is held to apply, individuals so compelled will be forced to choose between litigating their fourth amendment claims in state court or increasing the possibitlity of conviction by holding such claims back for litigation in a subsequent section 1983 federal action. The choice Congress intended to grant plaintiffs in section 1983 actions was between state and federal court, not a Hobson's choice between federal court and a state conviction.

Moreover, a federal court ruling on a search and seizure claim would not vitiate a state court ruling as to the applicability of the exclusionary rule. A section 1983 action does not free the convicted state court defendant, nor does it require a new trial, it merely provides a damages remedy. The exclusionary "rule is not a personal constitutional right", nor is it "calculated to

redress the injury to the privacy of the victim of the search and seizure . . ." *Stone* v. *Powell*, *supra*, 428 U.S. at 486. It is simply "a judicially created means of effectuating the rights secured by the Fourth Amendment." *Id.* at 482. Thus, holding collateral estoppel inapplicable in actions involving fourth amendment rights would in no way "disturb the jurisdiction of state courts" in applying the exclusionary rule, as petitioners apparently fear. (Pet. Br. P.20).

Lastly, respondent notes that, in deference to the Missouri state courts, the Court below held that the district court should abstain from hearing respondent's section 1983 claim "until the Missouri courts have had the opportunity to directly review [respondent's] conviction and the underlying search of his home." 606 F.2d at 799 (Pet. Cert., A-11). However, the Court below further noted that in "refusing [respondent] immediate relief", it was committing him to "perhaps several years of litigating his § 1983 claim," which appeared to the Court to be "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

Respondent agrees that it is regretable that he will be denied immediate relief, but submits that federal-state comity and the orderly administration of justice justify the decision of the Court below.

F. The federal res judicata act, 28 U.S.C. § 1738 is inapplicable under the facts of this case.

Petitioners further offer 28 U.S.C. § 1738 as "adducing an additional reason for applying a federal rule

of colateral estoppel to this case," although they do not rely on § 1738 as an "independent basis for reversing the Court of Appeals". (Pet. Br. p.25 n.5). Clearly, petitioners have good reason not to rely on section 1738 as an independent basis for reversing the court below. Even the cases which have applied section 1738 often recognize that "implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of "section 1738. *Red Fox* v. *Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977). *See, e.g., American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); *Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184, 188-90 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

As one commentator has stated:

> [I]f a federal purpose or interest will be undermined by allowing collateral estoppel effect, as might occur when a determination of law would be given this effect or when the availability of federal procedure is a prerequisite to carrying out the intent of Congress implicit in its definition of the substantive federal claim, a valid reason may exist for denying collateral estoppel effect. In any event, the federal purpose and interest which might be undermined by applying collateral estoppel must be balanced against the policy reasons which support this res judicata doctrine.

Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L. Rev. 1360, 1384 (1967).

As respondent has submitted throughout this brief, section 1983 is clearly a federal statute representing compelling federal policies and justifying a departure from general rules of collateral estoppel, such as section 1738. This Honorable Court was faced with an analogous issue in *Mitchum* v. *Foster*, *supra*, 407 U.S. 225, wherein it held that 28 U.S.C. § 2283, which is an absolute bar against injunction of state court proceedings in most cases, is inapplicable in cases under 42 U.S.C. § 1983 seeking to enjoin a state proceeding. Similarly, in the instant case, it seems unfathomable given section 1983's legislative history and congressional intent, that collateral estoppel could serve to deny respondent a federal forum for consideration of his search and seizure claim, when section 1983 clearly extends to "the actions of state courts . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 241-2.

II. Respondent's Claim Is Serious And Substantial And Evinces State Court Unwillingness To Advance To Federal Court Holdings On Fourth Amendment Issues.

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), Justices Marshall and Brennan noted a disinclination on the part of the state court to follow "federal constitutional pronoucements" on fourth amendment issues following *Stone* v. *Powell*, *supra*. *Id.* at 404. The instant case is notable for as similar disinclination on the part of the Missouri courts.

In *Mincey*, a group of police officers went to the petitioner's home to purchase heroin. A shoot-out occured in which one police officer was killed and other individuals injured. The uninjured officers took control and guarded the suspects and premises. Within ten minutes, homicide detectives arrived and proceeded to gather evidence. Their search was extensive and lasted four days. The evidence seized was subsequently used to convict the petitioner. The Arizona Supreme Court sustained the conviction based on a murder scene exception to the fourth amendment's warrant requirement.

This Court reversed petitioner's conviction holding that the Arizona murder scene exception was inconsistent with the fourth and fourteenth amendments and that the warrantless search "was not constitutionally permissible simply because a homicide had recently occurred there." 437 U.S. at 395.

In the instant case, a group of police officers went to respondent's home to purchase heroin. A shoot-out occured in which two police oficers were injured. Additional officers arrived until there were about thirty-five officers on the scene. After all the officers had arrived, one of the officers announced with a bullhorn, "We are police, let us in," and "Come out of the house, no action will be taken." Appellant and his father than came out of the house. The officers, suspecting that there were additional persons within, rushed into the house to check. Some time thereafter, exactly when is not clear from the record, Officer Brand, who had been designated as the "seizing officer," entered the house

and found the items which are the subject of the search respondent contends is unconstitutional. 606 F.2d at 796 (Pet. Cert., A-5). Officer Brand did not believe that there were other occupants present in respondent's residence. 587 S.W.2d at 340 (Pet. Cert., A-16).

The Missouri Court of Appeals upheld the constitutionality of Officer Brand's search notwithstanding that: (1) Officer Brand entered respondent's residence after it had been rushed to check for other residents and after respondent had been arrested (606 F.2d at 796 (Pet. Cert., A-5)); (2) Officer Brand entered to search for evidence, not for other occupants, and was designated the "seizing officer" or "seizure officer" (606 F.2d at 796 (Pet. Cert., A-5); 587 S.W.2d at 339 (Pet. Cert., A-14); (3) Officer Brand did not even believe that there were other occupants in the house (587 S.W.2d at 340 (Pet. Cert., A-16); and, (4) there were approximately thirty-five officers at the scene to guard the house and prevent evidence being lost, destroyed, or removed had the police decided to obtain a warrant (606 F.2d at 796 (Pet. Cert., A-5)).

The Missouri Court's justification for upholding this search was that Officer Brand entered pursuant to an emergency situation and the evidence admitted at trial was in plain view. 587 S.W.2d at 340-41 (Pet. Cert., A-16 - A-18). In so holding, the Missouri court ignored many of the very factors this Court considered relevant in *Mincey*. In actuality, about the only relevant factual distinction between the instant case and *Mincey* is that the search in *Mincey* lasted four days while the

search of respondent's home may have been for a shorter time: respondent is unsure. Nonetheless, the temporal length of the search was not the determining fact in *Mincey*. Moreover, the search in the instant case was, as in *Mincey*, far reaching, including a search of dresser drawers and old tires.

Even apart from *Mincey*, the Missouri Court ignored the federal constitutional pronouncements of the Eighth Circuit. In *United States* v. *Young*, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977), evidence technicians conducted a warrantless search of the appellant's home after a shootout and a subsequent warrantless entry by police to search for occupants. The trial court admitted the evidence so seized. Although recognizing that the police officers were lawfully in appellant's home and that they could lawfully seize evidence in plain view, the Court of Appeals further stated that:

> The seizure of money taken from the bedroom wall by the evidence technicians, however, does not fall within the exigent circumstance exception to the search warrant requirement, and should have been excluded. The technicians were looking for evidence, not robbers, at a time when the house had already been secured and after appellant had been arrested. A search warrant should have been obtained before proceeding further. *See Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *United States* v. *Carter*, 173 U.S. App. D.C. 54, 522 F.2d 666 (1965); *United States* v. *Gamble*, 473 F.2d 1274 (7th Cir. 1973).

553 F.2d at 1132. (Even though the Court of Appeals clearly held this search unconstitutional, appellant's conviction was affirmed because the Court determined that the admission of this evidence was harmless error).

Respondent submits that under the plain facts of this case and the federal constitutional pronouncements in *Mincey* v. *Arizona, supra*, and *United States* v. *Young, supra*, the search conducted by Officer Brand was *prima facia* unconstitutional. Of course, this is not the form within which to fully explicate the merits of respondent's "serious and substantial" claim. 606 F.2d at 799 (Pet. Cert., A-11). Respondent offers the foregoing synopsis merely to demonstrate the need for a federal forum to protect fourth amendment rights and, more particularly, to protect respondent's rights in the instant case.

III. Notwithstanding The Unavailability Of Federal Habeas Corpus, Collateral Estoppel Is Inapplicable In The Instant Case As Concerns The Basic Allegations In Respondent's Complaint Because (1) The State Court Held That Respondent's Fourth Amendment Rights Were Violated: And, (2) No Court Has Considered Plaintiff's Assault Claim.

As noted in respondent's Statement of the Case, *supra*, and as specifically held by the Court below (606 F.2d at 797 (Pet. Cert., A-5)), respondent's complaint alleges three constitutional violations: (1) a conspiracy to conduct an illegal search of his home; (2) an illegal

search of his home; and (3) an assault. (Pet. Cert., A-21-A-24). As concerns respondent's assault sclaim, petitioners have properly declined to challenge a reversal of the district court's order. (Pet. Br., p.6 n.2). The appellate court's reversal of the district court's dismissal of respondent's fourth amendment claim is likewise properly unchallengeable. Even if collateral estoppel was an appropriate docrine in section 1983 cases alleging the violation of fourth amendment rights (which it is not), the state court clearly held that respondent's fourth amendment rights were violated. The state court, in fact, suppressed certain evidence. (Pet. Cert., A-27).

The Missouri Court of Appeals, in considering respondent's appeal from his state court criminal conviction, recognized that the police officer conducting the search of plaintiff's home,

> found additional contraband in dresser drawers and hidden in some tires on a porch. Those items were not in plain view. After hearing on defendant's motion to suppress, *the trial court sustained the motion as to those items found in drawers and the tires* and denied the motion as to those items in plain view.

State v. *McCurry,* 587 S.W.2d 337, 340 (Mo. App. 1979); (Pet. Cert., A-15)(emphasis supplied).

Beyond question, the state court held that a search was conducted and evidence seized in violation of the fourth amendment. Thus, respondent is entitled to raise this violation of his constitutional rights, and a conspiracy to do so, in an action under section 1983 unencumbered by the doctrine of collateral estoppel.

Petitioners plainly admit that if respondent's complaint is "read as alleging that the Petitioners conspired to conduct, and did conduct, a search which was illegal in scope, then perhaps Respondent is not estopped." (Pet. Br. at p.36). Yet petitioner's attempt to avoid the plain impact of this statement by alleging that respondent's complaint seeks "redress solely for the alleged warrantless intrusion into his house, pursuant to an alleged conspiracy" as opposed to the search actually conducted. (Pet. Br. pp.11, 37). A simple reading of respondent's complaint reveals the inanity of this argument. Respondent, proceeding *pro se*, clearly alleged that petitioners "searched the house without obtaining a warrant. . . ." (Pet. cert., p.A-2, ¶ 5). Respondent's complaint quite obviously contends that the illegal search actually conducted as well as illegal entry of his home and the conspircy to enter and search violated his fourth amendment rights.

Nonetheless, even if it could be said that respondent's complaint was vague, *pro se* complaints by state prisoners are held to "less stringent standards than formal pleadings drafted by lawyers. . . ." *Haines* v. *Kerner*, 404 U.S. 519, 520-1 (1972). *See also Corby* v. *Conboy*, 457 F.2d 251, 253 (2d Cir. 1972). Such complaints should only be dismissed when a court can "say with assurance that under all the allegations . . . it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972). Given the state court's order suppressing certain

illegally obtained evidence, it appears beyond doubt that respondent can prove a set of facts in support of his illegal search and seizure claim entitling him to relief.

Petitioners further agree that respondent's claim cannot involve evidence suppressed by the state court because respondent was "keenly aware" that this suppressed evidence "would furnish no basis for liability in damages . . . ." (Pet. Br. p.37). While it is certainly unclear just what a *pro se* complainant drafting a pleading in the state penitentiary would be keenly aware of, it is clear that petitioners have misstated the law. Respondent undoubtedly has a cause of action against petitioners for damages based on a search pursuant to which evidence was seized and suppressed by the state court. The cases petitioners cite lend no support to their assertion to the contrary, and in actuality support respondent's position.

In *Mastracchio* v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (Pet. Br. p.37), a section 1983 complainant alleged that his constitutional right to a fair trial was violated by the admission into evidence at his state court criminal trial of a police officer's allegedly perjured testimony. The Court held that since the nature of this testimony was an essential element of complainant's state court criminal trial, the issue as to whether it was actually perjured was resolved against the complainant in state court and collaterally estopped his section 1983 action. (The Court also noted the possibility that an exception to the applicability of collateral estoppel in section 1983 actions might be appropriate in a case where habeas corpus was unavailable). (498 F.2d at 1260 n.2).

Alternatively the Court noted that, if it were to assume the admission of the allegedly perjured testimony was not essential to the complainant's conviction, he would lack a cause of action because he had "not suffered any damages as a result thereof." 498 F.2d at 1261. That is, if the allegedly perjured testimony did not affect complainant's conviction, he received a fair trial so as to comport with his right to a fair trial. The right to a fair trial was the only right complainant alleged had been violated. The issue was whether that right had been violated so as to create section 1983 liability, not whether the complainant could prove actual damages. In the instant case, respondent's fourth amendment rights were clearly violated apart from any possible effect this violation might have had on his right to a fair trial. As such, respondent has a cause of action under section 1983 for the illegal search and seizure pursuant to which the state court suppressed evidence.

The second case cited by petitioners, *Carey* v. *Piphus*, 435 U.S. 247 (1978) (Pet. Br. p.137), unequivocally supports respondent's contention that he has an action under section 1983 in connection with the evidence suppressed by the state court. In *Carey*, this Court held that section 1983 complainants who failed to prove any actual damages in connection with a violation of their constitutional right to procedural due process were nonetheless entitled to maintain an action for nominal damages. This court specifically noted that "[a] number of lower federal courts have approved the award of nominal damages under § 1983 where depriva-

tions of constitutional rights are not shown to have caused actual injury." 435 U.S. at 266-7 n.24. Such cases include section 1983 actions involving violations of fourth amendment rights. *See, e.g., Sexton* v. *Gibbs*, 327 F.Supp. 134, 142-3 (N.D. Tex. 1970), *aff'd.*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). *See generally* cases cited in *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert. denied*, 425 U.S. 63 (1976) (cited in *Carey* v. *Piphus, supra*, 435 U.S. at 264 n. 21.

The problem in *Carey* was that the complainants had gone to trial and failed to prove any actual damages. 435 U.S. at 251-52. This can hardly be utilized to limit a damages recovery in the instant case since respondent has yet to be granted the opportunity to present evidence. *Carey* certainly cannot be utilized to establish that respondent was "keenly aware" (Pet. Br. p.37) that he would be unable to recover damages in connection with the illegal search that resulted in the state court's order suppressing certain evidence. *Carey* specifically holds to the contrary.

Petitioner's argument that respondent is unable to state a cause of action against petitioners in connection with the unlawful search and seizure of the evidence suppressed at his trial demonstrates the anomalous nature of petitioner's entire approach to interpreting section 1983. If plaintiff is collaterally estopped from raising a search and seizure claim as to evidence admitted at his criminal trial, as petitioners allege, and is further precluded from raising such a claim as to items excluded

from his criminal trial, as petitioners allege, no state court criminal defendant would ever have a cause of action under section 1983 for a violation of his fourth amendment rights. Under this approach, if the evidence comes in, the defendant is estopped and if it's excluded, there is no damage and, therefore, no liability. Such a circuitous approach to interpreting section 1983 is obviously contrary to the Civil Rights Act's legislative history.

Although, as set forth above, respondent believes petitioners are arguing that respondent cannot state a cause of action against petitioners as to the illegal search and seizure which resulted in a state court suppression of evidence because he will be unable to prove damages, it is also possible that petitioners are arguing that respondent cannot state such a claim because petitioners Allen and Jacobsmeyer were incapacitated at the time the unlawful search occured and, therefore, cannot be held liable. As noted in respondent's Statement of the Case, his cause of action is against named individual police officers, unknown police officers, and the City of St. Louis Police Department. Clearly respondent can proceed against the City of St. Louis. *See Owen* v. *Independence*, _____ U.S. _____, 100 S. Ct. 1398 (1980); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978). Respondent can also proceed under section 1983 against police officers Allen, Jacobsmeyer and others who were involved in a conspiracy to deprive him of his constitutonal rights *See e.g. Phillips* v. *Trello*, 502 F. 2d 1000, 1004 (3d Cir.

1974); *Birnbaum* v. *Trussell*, 371 F. 2d 672, 676, (2d Cir. 1966); *Hahn* v. *Sargent*, 388 F. Supp. 445, 450 n. 5 (D. Mass.), *aff'd*, 523 F. 2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Ames* v. *Vavreck*, 356 F.Supp. 931, 940 (D.Minn. 1973). Respondent may proceed against the individual police officers who actually conducted the illegal search and seizure (*see, e.g., Monroe* v. *Pape*, 365 U.S. 167, 171-2, 187 (1961)), and the officers who assaulted him (*see, e.g., Rosenberg* v. *Martin*, 478 F.2d 520, 526 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973); *Collum* v. *Butler*, 421 F.2d 1257, 1259-60 (7th Cir.1970)

Although respondent was unaware of the identities of the officers who actually conducted the illegal search and seizure and assasulted him at the time he filed his section 1983 complaint, he has subsequently learned their identities.[4] The district court did not rely on the fact that respondent's action was, in part, against unknown officers in dismissing his complaint perhaps because respondent, at the very least, stated a claim against the City of St. Louis for violations of his constitutional rights and against officers Allen and Jacobsmeyer for conspiracy. Nonetheless, the Court of Appeals noted that respondent "learned the name of the police officer who allegedly assaulted him subsequent to

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[4] Officer Brand conducted the illegal search. Officer Brand had been designated by the officer in charge of the operation, Sgt. Hammer, as the "seizure officer". 587 S.W.2d at 339 (Pet. Cert., A-14). Respondent's complaint was dismissed with prejudice less than three months after he filed suit. He has not, as yet, had an opportunity to amend.

the filing of the § 1983 action," and held that respondent "should be granted leave to amend his complaint in this respect." 606 F.2d at 797 n.1 (Pet. Cert., A-6 n.1).

Respondent submits that the Court of Appeals correctly provided respondent leave to amend his complaint and that it would be unjust to preclude state prisoners acting *pro se* from amending section 1983 complaints that state actionable causes of action for constitutional violations. It is hardly likely that an individual will be able to elicit a police officer's name while that officer is beating him or searching his home long after he is removed from the premises and incarcerated.

Respondent has clearly demonstrated the existence of viable causes of action under section 1983 against the named as well as the unknown defendants. Upon remand to the district court, respondent is and has been prepared to amend his complaint to add the individual defendants involved in the deprivation of his constitutional rights and not already named. Respondent submits that the absence of these additional names from his complaint should not serve as a basis for dismissal.

Nonetheless, it is clear that respondent has stated a claim against petitioners Allen and Jacobsmeyer for their participation in a conspiracy to violate respondent's constitutinal rights and that the actual occurrence of an illegal search violating those rights is apparent on this record. As such, respondent submits that this Court should remand respondent's cause to the district court for further proceedings.

CONCLUSION

For the foregoing reasons, respondent submits that the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for further proceedings consistent therewith.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in holding collateral estoppel inapplicable in actions under 42 U.S.C. § 1983 alleging fourth amendment violations when to apply collateral estoppel would violate section 1983's legislative intent to provide a viable federal forum in which respondent can vindicate his fourth amendment rights.

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No. 79-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARVIN ALLEN, STEVEN JACOBSMEYER and
UNKNOWN POLICE OFFICERS,
Petitioners,

vs.

WILLIE MCCURRY,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. Respondent Has Misconceived The Proper Approach to Construction of 42 U.S.C. §1983 With Regard to Available Defenses; Properly Construed, §1983 Admits of a Collateral Estoppel Defense	3
II. Respondent's Attempt to Reargue His Criminal Appeal in This Court Illustrates the Need for a Federal Rule of Collateral Estoppel in §1983 Cases	5
III. Respondent's Attempt to Amend His Complaint in this Court Demonstrates that the District Court Properly Granted Partial Summary Judgment on the Basis of Collateral Estoppel	7
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Angel v. Bullington, 330 U.S. 183 (1946)	3
Carey v. Piphus, 435 U.S. 247 (1978)	7
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	6
Imbler v. Pachtman, 424 U.S. 409 (1976)	3
Martinez v. California, 100 S.Ct. 553 (1980)	5

Michigan v. Tyler, 436 U.S. 499 (1978) 5

Mincey v. Arizona, 437 U.S. 385 (1978) 5

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) . 4

Monroe v. Pape, 365 U.S. 167 (1961) 4

Owen v. City of Independence, 100 S.Ct. 1398 (1980)... 4

Tenney v. Brandhove, 341 U.S. 367 (1951)..... 3,4

United States v. Oaxaca, 569 F.2d 518 (9th Cir.), cert. denied, 439 U.S. 926 (1978) 5

Withrow v. Larkin, 421 U.S. 35 (1975) 3

Statutes and Rules:

42 U.S.C. §1983 1,3,4,5,6,7

Mo. Rev. Stat. §84.010, et seq. (1978)..... 2

Rule 12(b)(6), F.R.Civ.P..... 7

Rule 56, F.R.Civ.P 7

Other Authorities:

Cong. Globe, 42d Cong., 1st Sess 6,7

S. E. Thorne, ed., Introduction, A Discourse upon the Exposicion and Understandinge of Statutes (1942). 4

10 C. Wright & A. Miller, Federal Practice and Procedure: Civil (1973) 7

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PETITIONERS' REPLY BRIEF

INTRODUCTION

In their principal brief, Petitioners have demonstrated that the well-recognized defense of collateral estoppel can and must be available to defendants in actions under 42 U.S.C. §1983, consistent with the policy and purpose of that statute. Respondent and his amicus curiae, American Civil Liberties Union of Eastern Missouri (ACLU) have urged rejection of the defense, particularly where, as here, federal habeas corpus relief is unavailable to the §1983 plaintiff, a state prisoner alleging unlawful search and seizure. In view of the tenor of Respondent's argument, Petitioners feel compelled to reply to several points raised by Respondent.

At the outset, Petitioners observe that throughout his brief, Respondent has made a rather serious misstatement of the record - undoubtedly through oversight and not design. Neither the City of St. Louis nor the Board of Police Commissioners of the City of St. Louis (an independent state agency under Missouri law, Mo.Rev.Stat. §84.010 et seq. (1978)) is a party to this case. No summons was ever issued to or served upon either entity, nor are they named in the body of the Respondent's pro se complaint. The phrase "St. Louis Police Department, St. Louis, Missouri," appearing in the caption of the complaint, see Petition for Certiorari at A-21, was treated by the District Court and by Respondent himself[1] as descriptive only, referring to the "Unknown Police Officers."

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[1] Respondent himself has denied suing any governmental agencies. See Pet. Cert. A-30.

ARGUMENT

I. Respondent Has Misconceived The Proper Approach To Construction Of 42 U.S.C. §1983 With Regard To Available Defenses; Properly Construed, §1983 Admits Of A Collateral Estoppel Defense.

Respondent argues at length, and eloquently, concerning the need to provide special protection for federal constitutional rights, reiterating the familiar shibboleths concerning the seemingly endemic hostility of state officials, including judges, to those rights. Respondent overlooks both the peculiar circumstances surrounding the enactment of 42 U.S.C. §1983, as well as the long line of cases in this Court expressing confidence in the probity and integrity of state officers and agencies, even when federal constitutional questions are involved. Compare *Withrow* v. *Larkin,* 421 U.S. 35 (1975) with, e.g., *Angel* v. *Bullington,* 330 U.S. 183 (1946). Indeed, so polemical does Respondent's zeal become that he extends his accusations of indifference to the federal bench as well. Respondent's Brief, p. 27. If collateral estoppel is available as a defense under §1983, apparently the federal District Courts, as well as the state courts, will ignore their sworn duty.

In his impassioned plea for duplicative litigation, Respondent touches upon, but leaves undeveloped, the key to analysis of the questions presented in this case. Section 1983 "creates a species of tort liability that on its face admits of no immunities . . . ." *Imbler* v. *Pachtman,* 424 U.S. 409, 417 (1976). However, in *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951), this Court held that immunities "well-grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of §1983. "The decision in *Tenney* established that §1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman,* supra, 424 U.S. at 418. Thus, this Court has delineated a two-step analysis in determining availability of

defenses under §1983: (1) what was the common law when §1983 was enacted? and (2) is the policy of the common law in granting the defense consistent with the policy of §1983?[2] *Id.*, 421-25, esp. 424. See also *Owen* v. *City of Independence,* 100 S.Ct. 1398, 1409 (1980).

This analysis was followed in essence in *Owen* v. *City of Independence,* supra, and led to the rejection of a qualified immunity defense for municipalities sued under §1983. It is clear from *Owen* that a defense which was not clearly accepted and applied in common law tort actions will not be imported into the gloss on §1983. However, as demonstrated in Petitioners' principal brief, the defense of collateral estoppel survives the *Tenney-Imbler* analysis, being both well-grounded in history and reason, and consistent with the policy of §1983 to provide a supplementary federal remedy to protect federal rights when state remedies are adequate in theory but unavailable in practice. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).[3] Thus, contrary to Respondent's contention, collateral estoppel can and must be applied in this case.

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[2] The approach of this Court is in this respect similar to a search for the "equity of the statute," bearing in mind, as it does, both the common law and the statutory objective. See S.E. Thorne, ed., Introduction, A Discourse upon the Exposicion and Understandinge of Statutes (1942) (for the enlightenment of Respondent's counsel, Samuel E. Thorne is Professor of Law Emeritus, lately Charles Stebbins Fairchild Professor of Law, Harvard University).

[3] Respondent's asseveration that the legislative history of §1983 is "unequivocal" as to the issues in the case at bar must be dismissed as hyperbolic advocacy. Compare *Monell* v. *Dept. of Social Services,* 436 U.S. 658 (1978) with *Monroe* v. *Pape,* supra. So far as the Congressional debates show, neither the defense of collateral estoppel nor the federal policy expressed currently by 28 U.S.C. §1738 can be deemed abrogated "by covert inclusion in the general language" of §1983. Moreover, the argument advanced by Respondent (Brief, p. 31), to the effect that collateral estoppel is no defense under §1983 because the statute extends to actions of the state courts, is directly

II. Respondent's Attempt To Reargue His Criminal Appeal In This Court Illustrates The Need For A Federal Rule Of Collateral Estoppel In §1983 Cases.

Petitioners decline to argue the merits of Respondent's criminal appeal, which has been decided adversely to him.[4] See Pet. Cert. A-13. Suffice it to say that, in an effort to bolster his case, Respondent attempts here precisely what a federal rule of collateral estoppel would foreclose: relitigation of state criminal cases in federal court through the medium of §1983. The dangers inherent in such duplicative litigation are obvious, and the benefits, if any, to be derived are ephemeral at best. Respondent's own arguments evidence the paradox: parallel §1983 actions will not interfere with or undermine state criminal judgments, but are needed to deter unconstitutional conduct by both police and state courts as well. See Respondent's Brief, p. 30; see also ACLU Brief, pp. 10-11. If a §1983 action will have no effect on state criminal proceedings, what deterrent effect will it have? Police officers will simply be confused by inconsistent adjudications; moreover, officers who are found to have acted illegally, but in good faith and with a reasonable belief in the lawfulness of their actions, will not be "deterred" at all, except insofar as protracted duplicative litigation deters one from doing his job as best he can.

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refuted by the legislative history. See the remarks of Senator Edmunds, quoted in Petitioners' principal brief at 21-22. Congress' refusal to give federal courts exclusive jurisdiction in §1983 cases, see *Martinez* v. *California,* 100 S.Ct. 553, 558 n. 7 (1980), also militates against Respondent's claims.

[4] Petitioners would note that, contrary to Respondent's assertions, the Missouri Court of Appeals did not misapply *Mincey* v. *Arizona,* 437 U.S. 385 (1978). The original entry of the police officers into Respondent's home was clearly proper, and the fact that evidence seen in plain view at the time was apparently seized a short time later by another officer does not invalidate the lawful entry or seizure of evidence in plain view. See *Michigan* v. *Tyler,* 436 U.S. 499, 509-10 (1978); *United States* v. *Oaxaca,* 569 F.2d 518 (9th Cir.), cert. denied, 439 U.S. 926 (1978).

Respondent and ACLU both contend that the dangers of a flood of duplicative litigation are slight, but the realities of prisoner-initiated federal litigation make their contentions seem meretricious indeed. A superficial examination of S.W.2d advance sheets from April to August, 1980, reveals more than a score of state criminal cases involving search and seizure issues. The potential for an increase in §1983 litigation exists, and it is fatuous to deny it. This potential should not be ignored. Indeed, even Respondent and his amicus argue that collateral estoppel can prevail if federal habeas corpus relief is available. E.g., Respondent's Brief, p. 18. This approach is "logically sound", but "perhaps" at variance with the legislative history. *Id.* Surely Respondent cannot have it both ways. Either collateral estoppel was abrogated by §1983 or it was not. To apply collateral estoppel only when habeas corpus is available is merely another form of abstention, abstention until a federal court acts.[5]

Clearly, Respondent confuses remedies with results. Respondent received a full and fair hearing on his Fourth Amendment claim in the state courts. The opinion of the Missouri Court of Appeals, Pet. Cert. A-13, reflects not hostility toward federal constitutional rights, but rather a conscientious effort by state judges to apply controlling federal law. Such an effort was exactly what the 42d Congress expected from the state courts;

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[5] In this connection, Petitioners observe that the Court of Appeals' invocation of the abstention doctrine in this case, see Pet. Cert. A-11 -A-12, is ill-advised. What is accomplished by delaying a §1983 damage action pending outcome of a state criminal appeal? If the state judgment has no collateral consequences, who benefits from such delay? Abstention is properly invoked only when equitable relief is sought which would have a direct impact on the state proceeding, and the state proceeding could itself eliminate the need for such relief. E.g., *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). Thus, contrary to Respondent's assertion, Brief, p. 34, abstention in cases such as this does not serve federal-state comity or the orderly administration of justice.

§1983 was enacted to provide for the case in which no such effort was or would be made, even though the state remedy appeared to be adequate. The federal rule of collateral estoppel sought by Petitioners would ensure that the intent of the 42d Congress as well as of the Framers of our federal system will be carried out.

III. Respondent's Attempt To Amend His Complaint In This Court Demonstrates That The District Court Properly Granted Partial Summary Judgment On The Basis Of Collateral Estoppel.

Respondent, apparently overlooking the actual posture of this case, devotes considerable attention to a liberal construction of his pro se pleadings. However, Petitioners must point out that the issue of collateral estoppel was raised by motion for partial summary judgment, Pet. Cert. A-25, which was granted by the District Court, *id.*, A-3. Accordingly, Rule 56, F.R.Civ.P., and not Rule 12(b)(6), is controlling. See generally 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2735, pp. 653-68 (1973). Petitioners do not now and never have contested the Court of Appeals' reinstatement of Respondent's assault claim. Pet. Cert. 4 n. 1.

Of course, Respondent is correct in arguing that his pro se complaint is entitled to liberal construction, *Estelle* v. *Gamble*, 429 U.S. 97 (1976), and that he could be entitled to nominal damages on account of the seizure of illegal drugs from the drawers and stack of tires in his home. *Carey* v. *Piphus*, 435 U.S. 247 (1978). Nevertheless, Petitioners' (and the District Court's) construction of Respondent's pleadings (including cross-motion for summary judgment) cannot be characterized as inane. Respondent may or may not have enough common sense to know that even an illegal seizure of contraband would not warrant damages of $1,000,000 - the amount claimed in the complaint. Pet. Cert. A-24. His pleadings, however, reveal that his claim relates not to the scope of the search, but to the va-

lidity of the entry into his home without a warrant. See Pet. Cert. A-31. Respondent should not now be heard in his attempt to parse his claims and amend his complaint on appeal. This belated shifting of ground merely reflects the correctness of the construction of his pleadings below.[6]

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' principal brief, the judgment of the Court of Appeals must be reversed and the case remanded either for reinstatement of the District Court's order granting partial summary judgment or for reconsideration.

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[6] Even if Respondent's complaint is construed to allege multiple claims of illegal search and seizure, the judgment of the Court of Appeals must nonetheless be reversed (or vacated) for failure to apply appropriate federal rules of collateral estoppel, which would in any case bar at least of Respondent's Fourth Amendment claims.

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IN THE

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Respondent.

On Writ of Certiorari to the United States
Court of Appeals, Eighth Circuit

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Preliminary Statement	1
Interest of Amicus	1
Argument:	
I. Introduction	3
II. Recognition of a Clear Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding Is Supported By the Decision of this Court In *Stone* v. *Powell* And Is Justified By the Special Role of Constitutionally Guaranteed Rights In Our System of Government.	4
III. Recognition of Such A Rule is Necessary to Provide An Adequate Mechanism For Federal Regulation And Control of State Court Enforcement of the Fourth Amendment Prohibition of Unreasonable Searches And Seizures	11
IV. Potential Increase in Litigation As A Result of Establishment of a Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding is Highly Speculative, Exaggerated And Of Minor Significance to a Determination of the Substantive Questions Presented.	13
Conclusion	16

TABLE OF AUTHORITIES

Page

Cases:

Basista v. Weir, 225 F. Supp. 619 (W.D. Pa. 1964) rev'd in part and aff'd in part, 340 F.2d 74 (3rd Cir. 1965) 14

Bethea v. Reid, 445 F.2d 1163 (3rd Cir. 1971) 14

Brubaker v. King, 505 F.2d 534 (7th Cir. 1974) 14

Carlson v. Green, 100 S.Ct. 1468 (1980) 9

Clark v. Illinois, 415 F.Supp. 149 (N.D.Ill. 1976) 14

Clark v. Lutcher, 436 F.Supp. 1266 (M.D. Pa. 1977) ... 14

Clark v. Zimmerman, 394 F.Supp. 1166 (M. D. Pa. 1975) 14

Covington v. Cole, 528 F.2d 1365 (5th Cir. 1976) 14

Davis v. Eide, 439 F.2d 1077 (9th Cir. 1971)..... 14

Ellis v. Dyson, 421 U.S. 426 (1975) (Powell, J., dissenting) 3

Fay v. Noia, 372 U.S. 391 (1963) 7

Kaufman v. United States, 394 U.S. 217 (1969) 7

Mincey v. Arizona, 437 U.S. 385 (1977) 11,12

Mitchum v. Foster, 407 U.S. 225 (1972) 12

Moran v. Mitchell, 354 F.Supp. 86 (E.D. Va. 1973) 14

Owen v. City of Independence, 100 S.Ct. 1398 (1980)... 9

Perez v. Ledesma, 401 U.S. 82 (1971) 3

Preiser v. Rodriguez, 411 U.S. 475 (1973) 3,7

Simms v. Reiner, 419 F.Supp. 468 (N.D. Ill. 1976) 14

Steffel v. Thompson, 415 U.S. 452 (1974) 4

Stone v. Powell, 428 U.S. 465 (1976) . 3,4,6,7,8,9,10,11,12,14,16

Tang v. Appellate Div. of New York Supreme Court, 487 F.2d 138 (2nd Cir. 1973), cert. denied, 416 U.S. 906 (1974) 13

Thistlethwaite v. City of New York, 497 F.2d 339, (2nd Cir. 1973) 13

Wilwording v. Swenson, 404 U.S. 249 (1971) (Burger, C.J., dissenting) 3

Secondary Authorities

Comment, "The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions," 1975 U. Ill. Law Forum 95 7

Comment, "Collateral Estoppel in Section 1983 Actions After Stone v. Powell: McCurry v. Allen," 64 Minn. L. Rev. 1060 (1980) 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-935

MARVIN ALLEN, STEVEN JACOBSMEYER
and UNKNOWN POLICE OFFICERS,
Petitioner,

vs.

WILLIE MCCURRY,,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals, Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI, AS AMICUS CURIAE IN SUPPORT OF THE RESONDENT

PRELIMINARY STATEMENT

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file this brief has been granted by counsel for Petitioners and counsel for Respondent. Letters indicating the consent of both parties are on file with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal and fair treatment under

the law. The American Civil Liberties Union of Eastern Missouri (ACLU/EM) is composed of two thousand members and geographically covers three quarters of the State of Missouri. As a member organization of the American Civil Liberties Union, ACLU/EM is committed to resist any denigration of the civil rights guaranteed by the United States Constitution and to encourage the vigorous and sustained enforcement and protection of those rights.

Amicus believes that this case, concerning the scope of relief under the Civil Rights Act for an illegal search and seizure, presents a significant issue relating to the protection of fundamental rights and societal values incorporated in the Fourth Amendment to the United States Constitution.

The criminally accused are subjected to the scorn and abuse of society. A heinous and brutal criminal act will activate an almost instinctive desire to retaliate with brute force and violence against the perpetrator. While such action by a police office may be rationally explained as the result of such irrational behavior, such behavior is unlawful and only enhances the brutalization of the law enforcement system. Effective deterrence of this behavior should be fostered. This case presents this Court with the opportunity to place its imprimatur upon a form of relief which would supply a needed degree of such deterrence.

ARGUMENT

I. Introduction

The instant proceedings present this Court with the opportunity to answer the following question: whether society's interest in protecting those rights guaranteed by the Fourth Amendment outweigh the policies of collateral estoppel, primarily finality and judicial economy, in the narrow context of a proceeding commenced by a state prisoner whose access to a federal forum for habeas corpus relief has been terminated by the decision in *Stone* v. *Powell.*[1] Hypothesizing that a state prisoner's constitutional rights are violated in a search and seizure, and further that evidence thus unlawfully obtained is erroneously introduced at his trial and that federal habeas corpus relief is not available, this Court must determine whether Section 1983 of the Civil Rights Act remains an unimpeded avenue of civil relief.[2]

Amicus strongly urges this Court to approve the remedy sought by Respondent herein. The protection of federal civil rights presents demands so special as to overshadow the policies enforced by res judicata principles at least in the narrow context of the question presented here.[3] Strict application of the rules of

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[1]428 U.S. 465 (1976). The precise issue has not been previously ruled or addressed outside of dicta by this Court. Inconclusive references to the issue have appeared in *Ellis* v. *Dyson,* 421 U.S. 426, 437 (1975) (Powell , J., dissenting); *Preiser* v. *Rodriguez,* 411 U.S. 475, 509 N. 14 (1973) (Brennan, J., dissenting); *Wilwording* v. *Swenson,* 404 U.S. 249, 252 (1971) (Burger, C.J., dissenting); *Perez* v. *Ledesma,* 401 U.S. 82, 125 (1971) (Brennan, J., dissenting).

[2]428 U.S. at 494; it is noteworthy that even in *Stone* v. *Powell* it was recognized that federal habeas corpus relief would remain available to litigate the Fourth Amendment claim under certain circumstances, *Id.* at 482.

[3]Torke, "Res Judicata in Federal Civil Rights Actions Following State Litigation," 9 *Ind. L. Rev.* 543, 543 (1976); *see also generally "Developments in the Law—Section 1983 and Federalism,"* 90 Harv. L. Rev. 1133 (1977); Theis, "Res Judicata in Civil Rights Cases: An Introduction to the Problem," 70 Nw. U. L. Rev. 859 (1976).

collateral estoppel would preclude effective enforcement of these rights which are so fragile and so vital to our shared vision of society. The federal courts should and must remain the primary guardians of constitutional rights upon whom primary and powerful reliance for vindicating these rights has been imposed.[4]

II.

Recognition of a Clear Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding Is Supported By the Decision of This Court in *Stone* v. *Powell* And Is Justified By the Special Role of Constitutionally Guaranteed Rights In Our System of Government.

In *Stone* v. *Powell* this Court held that in the context of federal habeas corpus relief the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.[5] For these reasons it was ruled that such relief might not be granted on the ground that evidence obtained in an unconstitutional search or seizure was introduced at a state prisoner's trial.

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[4] *Steffel* v. *Thompson*, 415 U.S. 452, 463-465, 472-73 (1974).

[5] 428 U.S. at 494-95.

In prior discussion of the basis for these conclusions the Court noted that the principal rationale for the exclusionary rule is the deterrence of future unlawful police conduct.[6] The Court also declared that application of that rule deflects the truthfinding process and often frees the guilty.[7] The core of the analysis supporting the holding was stated as follows:

> But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.[35] Even if one rationally could assume that some additional incremental deterrent effect would be

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[6] *Id.* at 484.

[7] *Id.* at 490.

> presented in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.[8]

As the discussion above suggests, *Stone* v. *Powell* was not a decision premised on rules of res judicata. The focus of *Stone* v. *Powell* was primarily on the harmful impact of the exclusionary rule on certain aspects of the criminal justice system. Central to its analysis was the conclusion that the costs of the exclusionary rule to the truth-seeking process of the criminal trial outweighed the benefits of deterrence of unlawful police behavior. Concluding that federal habeas corpus relief bore but a tenuous link to the subsequent behavior of law enforcement personnel, the Court ruled that the costs to society of release of the Defendant, convicted in an otherwise valid state proceeding were too great, despite the damage to constitutional values. Fourth Amendment search and seizure claims were distinguished from other claims of violation of constitutional rights on the basis that the fruits of such claimed violations were often persuasive and tangible evidence, not inherently suspect.

Extrapolating on these principles, amicus believes that permitting Section 1983 relief in the context of similar claims following a state proceeding is logical, proper and necessary.

Though *Stone* v. *Powell* was decided against the background of a prior and final state judgment, res judicata values played but a secondary and tangential role in the analysis. Indeed, it seems clear that federal review of the state court ruling would have been upheld had the Court concluded that the social costs in terms of the deflection of the truth-finding processes and the resulting release of at least some state prisoners guilty of criminal offenses were outweighed by the deterrent effects of

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[8] *Id.* at 493-94.

enforcement of the exclusionary rule. Absent this conclusion habeas corpus relief would have been found warranted as it was earlier found to be in *Kaufman* v. *United States.*[9] In reversing the *Kaufman* decision in *Stone* v. *Powell,* the Court did not indicate that the basic premises underpinning federal habeas corpus review of state proceedings were invalid. As this Court earlier stated:

> "Plainly the interest in finality is the same with regard to both federal and state prisoners. With regard to both, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack."[10]

It is logical and proper to grant Section 1983 relief in this present context because the deterrent effect of such relief would be significant, while the detriment to the truth-finding process would be non-existent. The results of the state proceeding would be unaffected by a judgment in a Section 1983 action that the Plaintiff's constitutional rights had been violated in the

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[9]394 U.S. 217 (1969).

[10]Id. at 228; the Court has been in full agreement on the proposition the "principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings." *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973); *see also Fay* v. *Noia,* 372 U.S. 391, 423 (1963). *Res judicata* operates in a severely diluted fashion in habeas corpus. *Torke, supra* note 3, at 567. The author there suggests that the state criminal defendant is in a singularly sympathetic position and, that a "special res judicata" should be applied in Section 1983 actions which he files. *Id.* at 569. *Cf.* Comment, "The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions," 1975 *U. Ill. Law Forum* 95, 106. It is thus clear that the full faith and credit statute, 28 U.S.C. §1738, has but attenuated applicability in this field.

seizure of evidence which was admitted at the state trial. Thus the truth-finding processes of the criminal trial would go untainted.

Meanwhile, the deterrent effect of such relief would be substantial. The relief would be aimed directly at the persons or entities responsible for the unlawful conduct. The onus of any relief would not be diffused generally throughout society, but would be focused and specific.[11]

Applying the reasoning of *Stone* v. *Powell* to the present question facing the Court, one commentor has declared:

> "Section 1983 actions fare better under this balancing test. The social costs of section 1983 actions are not as high because they do not culminate in the release of guilty persons from custody. In addition, the benefits may be more significant. The deterrence of police misconduct that would result from allowing section 1983 actions for damages against policemen and municipalities might be far greater than that achieved by applying the exclusionary rule upon collateral review. The threat of monetary liability is likely to have a greater impact than the prospect of losing a conviction. Moreover, in cases like *McCurry* it is a mistake to assess the benefits of collateral review solely in terms of deterrence. Section 1983 also serves as a vehicle for victim compensation."[12]

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[11]Additional actions may also be necessary to bolster the deterrent effect of Section 1983 judgments, *see generally* Project, "Suing the Police in Federal Court," 88 *Yale L. J.* 781 (1979). Need for such supplementary deterrence merely indicates that permitting Section 1983 relief alone would not provide the full effect required, not that it is unnecessary or ineffectual.

[12]Comment, "Collateral Estoppel in Section 1983 Actions After *Stone* v. *Powell: McCurry* v. *Allen*," 64 *Minn. L. Rev.* 1060 (1980).

A civil remedy recoverable against individuals is logically a more effective deterrent than a remedy imposing a penalty on society as a whole in the form of exclusion of unconstitutionally obtained evidence. "It is almost axiomatic that the threat of damages has a deterrent effect. . ., surely particularly so when the individual official faces personal financial liability."[13]

The same reasoning was drawn upon in the recent decision of *Owen* v. *City of Independence* in which the majority commented that, "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . ."[14] A decision favorable to Respondent might do much to enhance the deterrent effect of Section 1983 relief by drawing the municipal employer into the relief granted.

This Court in deciding *Stone* v. *Powell* commenced from the proposition that federal court review of state court judgments involving the federal constitutional rights of criminal defendants is warranted and mandated by Congress and the Constitution. An underlying premise of *Stone* v. *Powell* is that protection of the federal constitutional rights of criminal defendants is a special domain of the federal courts. The federal hand should be stayed only where to do otherwise would produce minor benefit at great cost to society.

The decision of the U.S. Court of Appeals for the Eighth Circuit meshes extremely well with these principles.

That decision provides a federal right of action to review a state court judgment denying a criminal defendant relief on his claim of violation of his constitutional rights while in no way in-

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[13] *Carlson* v. *Green*. 100 S.Ct. 1468, 1473 (1980).

[14] 100 S.Ct 1398, 1415 (1980).

terfering with the truth-seeking processes of the criminal proceeding or otherwise subjecting society to the costs found unacceptable in *Stone* v. *Powell.* While res judicata principles may be offended by this result, the Court has recognized by the very rationale of the *Stone* decision that those principles have a more limited range of viability in the context of federal constitutional decision-making in criminal proceedings.

Thus the decision of the Court of Appeals stakes out a well-placed meeting ground between the policies calling for special protection of federal constitutional rights and the interests of society demanding that the guilty not go free because the constable blundered.

Stone v. *Powell,* contrary to the analysis of Amici in Support of Petitioners, did not place significant emphasis on judicial economy as a rationale for its decision. While mentioned as one aspect of the background of the decision, amicus believes that that policy plus the related benefits of finality of decision would not have been enough to lead this Court to the result of that case.

The potential deterrent effect of Section 1983 relief in this setting is substantial. Its costs to society in terms of deflection of the truth-seeking processes are non-existent. In the context of federal constitutional rights the normal rules of finality have but a limited role. Permitting this form of relief would thus potentially provide a substantial benefit to society in enforcement of constitutional rights with necessary and acceptable costs to society through relitigation of certain constitutional claims.

III.

Recognition of Such A Rule is Necessary to Provide An Adequate Mechanism for Federal Regulation and Control of State Court Enforcement of the Fourth Amendment Prohibition of Unreasonable Searches And Seizures.

Another and independent reason why Section 1983 relief in this setting is necessary in the aftermath of *Stone* v. *Powell* is that state courts have been left relatively unchecked in their interpretation and application of the Fourth Amendment since that decision. Review by the United States Supreme Court provides an ultimate, but limited, mechanism for assuring compliance by state courts with the dictates of that Amendment. As pointed out by Justice Marshall in his concurrence in *Mincey* v. *Arizona:*[15]

> "Prior to *Stone* v. *Powell,* there would have been no need to grant certiorari in a case such as this, since the federal habeas remedy would have been available to the defendant. Indeed, prior to *Stone* petitioner here probably would not even have had to utilize federal habeas, since the Arizona Courts were at that earlier time more inclined to follow the federal constitutional pronouncements of the Ninth Circuit, as discussed above. But *Stone* eliminated the habeas remedy with regard to Fourth Amendment violations, thus allowing state court rulings to diverge from lower federal court rulings on these issues and placing a correspondingly greater burden on this Court to ensure uniform federal law in the Fourth Amendment area."

Thus *Stone* v. *Powell* has weakened the constraints which bound the state courts to respect their obligation to enforce the rights guaranteed by the United States Constitution, while at the

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[15]437 U.S. 385, 402 (1977).

same time increasing the burden on this Court by necessitating increased grant of direct review of cases raising Fourth Amendment issues.

State court reluctance to apply the exclusionary rule in a vigorous and steadfast manner would naturally be supported by the decision in *Stone* v. *Powell.*[16] The same factors which drove this Court to eliminate federal habeas corpus review with respect to claims that unconstitutionally seized evidence was introduced at a state prisoner's trial motivate state court judges to loosen the strictures of the exclusionary rule.

While it is impossible to verify that state court judges introduce a balancing process into their application of the exclusionary rule, cases such as *Mincey* v. *Arizona* suggest such is in fact their practice. A state tribunal is naturally reluctant to exclude evidence which as stated in *Stone* v. *Powell,* is "typically reliable and often the most probative information bearing on the guilt or innocence of the Defendant. The state tribunal may thus effectively decide a question different from that presented to the federal court in a complaint based on Section 1983.

Furthermore, since the federal plaintiff is forced to raise his federal claim in the criminal trial as a defendant, he had no choice but to submit these constitutional issues to the state tribunal. The state forum will thus be frequently confronted with important and substantial federal constitutional claims which the criminal defendant is unwillingly compelled to litigate. The criminal defendant should not be penalized by his

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[16] *Cf. Mitchum* v. *Foster,* 407 U.S. 225, 242 (1972) (antipathy of state officers, including state judicial officers, could only be avoided by access to a federal forum).

[17] 437 U.S. at 404.

[18] 428 U.S. at 490.

inability to select the forum for presentation of these claims. This circumstance largely distinguishes this case from all those civil cases in which a party has the opportunity to choose the forum in which to litigate his claims.[19]

The remedy sought by Respondent is thus necessary to the federal function of assuring state compliance with federal constitutional guarantees, a function this Court cannot alone perform. It is desirable and necessary to provide a federal forum free from the distortive pressures under which a state tribunal must rule on the Fourth Amendment issues presented before it in a typical suppression hearing.

IV

Potential Increase in Litigation As A Result of Establishment of a Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding is Highly Speculative, Exaggerated And Of Minor Significance to a Determination of the Substantive Questions Presented.

Careful husbandry of judicial resources is a valuable goal. However, for the following reasons, Petitioners and Amici in support of Petitioners place too much emphasis on this policy goal in their application of collateral estoppel principles to claims based upon alleged unlawful search and seizure which have been previously raised in a prior state criminal proceeding.

It is inherently impossible to predict how many cases may be brought in the future seeking damages for the violation of a state prisoner's Fourth Amendment rights in the seizure of evidence which has been subsequently admitted as evidence at

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[19] *See, e.g., Thistlethwaite* v. *City of New York,* 497 F.2d 339, 345 (2nd Cir. 1974); *Tang* v. *Appellate Div. of New York Supreme Court,* 487 F.2d 138, 143 (2nd Cir. 1973), *cert denied,* 416 U.S. 906, (1974).

his trial. It is correct that the total number of civil rights actions have increased in recent years, as pointed out by Petitioners and amici in support of Petitioners. But this fact cannot be used as the basis for any conclusion with respect to the future frequency of the type of action filed by Willie McCurry. To do so entails the grossest speculation.

The research of this amicus has revealed only five cases decided in the Federal Courts of Appeals for the period of January, 1945 to April, 1980 which involved the issue now before this Court.[20] Only six reported decisions of the Federal District Courts have been found which treat this same question during the period of January, 1960 to April, 1980.[21] (The Office of the Administrator of the Courts unfortunately does not keep records narrowly defining the nature of federal cases and was thus unable to state the number of cases involving this issue for the period of its recordkeeping). Finally, it is obvious that much of the impetus to seek Section 1983 relief for this narrowly circumscribed zone of constitutional deprivation has only developed with the decision in *Stone* v. *Powell.* Prior to that decision habeas corpus relief was available for a state prisoner's vindication of these Fourth Amendment rights.

Thus, all considered, it is expremely speculative to predict that a "torrent" or "avalanche" of litigation would result from

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[20]Cases found from the federal appellate court raising or decided on this narrow issue were *Covington* v. *Cole,* 528 F. 2d 1365 (5th Cir. 1976); *Davis* v. *Eide,* 439 F. 2d 1077 (9th Cir. 1971); *Brubaker* v. *King,* 505 F. 2d 534 (7th Cir. 1974); *Bethea* v. *Reid,* 445 F. 2d 1163 (3rd Cir. 1971); *Basista* v. *Weir,* 340 F. 2d 74 (3rd Cir. 1965). Both traditional and computerized research tools were used in the case search undertaken to collect the decisions of the federal trial and appellate courts raising this question.

[21]The cases found were *Clark* v. *Lutcher,* 436 F. Supp. 1266 (M.D. Pa. 1977); *Simms* v. *Reiner,* 419 F. Supp. 468 (N.D. Ill. 1976); *Clark* v. *Illinois,* 415 F. Supp. 149 (N.D. Ill. 1976); *Clark* v. *Zimmerman,* 394 F. Supp. 1166 (M.D. Pa. 1975); *Moran* v. *Mitchell,* 354 F. Supp. 86 (E.D. Va. 1973); *Basista* v. *Weir,* 225 F. Supp. 619 (N.D. Pa. 1964).

the decision of the U.S. Court of Appeals for the Eighth Circuit. Certainly such a decision would permit state prisoners access to the federal court and thereby add some additional cases to the federal docket, but such was the intention of the drafters of Section 1983 and this access is necessary to preserve the primacy and force of the guarantees of the constitution.

Finally, amicus would also suggest that the absolute number of cases which might be filed is not the relevant inquiry. Judicial economy, in the context of collateral estoppel rules, is premised on a desire to prevent fruitless, wasteful and oppressive litigation of specific claims, not on wholesale rejection of certain types of claims or calculations of the total number of claims which may be brought in a specific context.

Amicus respectfully suggests that the Court should focus on the question whether federal interests outweigh the policies of res judicata in the context of a single case. The answer to this question with respect to a single case would provide the answer to the question whether the volume of litigation would be justified. For, if this form of relief is found justified and necessary in the context of a single case in order to provide an added deterrent to unconstitutional and lawless behavior, then it will similarly be justified for each subsequent case. Total volume of cases thus becomes irrelevant.[22]

Again, amicus suggests that the relevant inquiry should be whether in this setting federal interests in the protection of constitutional rights require a federal forum be available at some stage of a criminal proceeding and whether the devotion of the federal courts' time and energy to that task is justified. Having answered this question the absolute number of cases is unimportant.

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[22]Amicus in any case believes that that volume would not be great in view of the highly limited context of this case, involving a Fourth Amendment claim relating to an alleged search and seizure previously litigated in a state court proceeding.

CONCLUSION

The protection of federal civil rights presents special demands which overshadow the policies of res judicata. A civil action for relief pursuant to 42 U.S.C. §1983 provides a maximum of deterrence of illegal searches and seizures while imposing a minimum of cost on society at large. The deterrent effect of such litigation, where federal habeas corpus relief is not available, justifies the subordination of res judicata policies in order to enhance the protection of federal civil rights.

Amicus submits that the ruling of the U.S. Court of Appeals for the Eighth Circuit was correct. That decision properly held that this Court's opinion in *Stone* v. *Powell* supports and requires the conclusion that relief in accordance with the Civil Rights Act be permitted to a state prisoner whose federal civil rights have been violated in the search and seizure of evidence subsequently admitted at his criminal trial. This holding comports with the long-standing doctrine that normal principles of res judicata do not apply with full vigor in the context of protection of the constitutional rights of state prisoners. It would create a significant deterrent to unlawful police behavior while minimizing the cost to society of such deterrence.

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amici	2
I. General Interest of Amici	2
II. Specific Interest of Amici	3
Factual and Procedural Setting of This Case	6
Argument	9
I. A Convicted Felon Is Precluded Under the Rule of Stone v. Powell from Maintaining an Action for Damages Under 42 U. S. C. § 1983 on the Basis That the Same Claim of Unlawful Search and Seizure Was Raised, Fully Litigated, and Adjudicated Adversely to Him in a Prior State Criminal Proceeding, and on the Basis of Federally Formulated Rules of Res Judicata and Collateral Estoppel	9
II. Affirmance of the Decision of the Court of Appeals Will Encourage Innumerable State Prisoners to Seek Relitigation of Fourth Amendment and Other Constitutional Claims Under 42 U. S. C. § 1983 and Will Subject Increasing Numbers of Law Enforcement Officers to the Harassment and Vexation of Groundless Civil Litigation	12
Conclusion	18

TABLE OF AUTHORITIES

Cases

Brazzell v. Adams, 493 F. 2d 489 (5th Cir. 1974) 11

Brown v. De Layo, 498 F. 2d 1173 (10th 1974) 10

Brubaker v. King, 505 F. 2d 534 (7th Cir. 1974) 12

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Garner v. Louisiana State Board of Education, 489 F. 2d 91 (5th Cir. 1974) 9

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Martin v. Delcambre, 578 F. 2d 1164 (5th Cir. 1978) .. 11

Mastracchio v. Ricci, 498 F. 2d 1257 (1st Cir. 1974) ..10, 11

McCurry v. Allen, 466 F. Supp. 514 (E. D. Mo. 1978) .. 8

McCurry v. Allen, 606 F. 2d 795 (8th Cir. 1979) 8, 12

Metros v. United States District Court, 441 F. 2d 313 (10th Cir. 1970) 11, 12

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Mulligan v. Schlachter, 389 F. 2d 231 (6th Cir. 1968) .. 12

Ney v. California, 439 F. 2d 1285 (9th Cir. 1971) 12

Preiser v. Rodriguez, 411 U. S. 475 (1973) 9

Rice v. Wolff, 513 F. 2d 1280 (8th Cir. 1975) 11

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Robb v. Connelly, 111 U. S. 624 (1884) 10

Stone v. Powell, 428 U. S. 465 (1976) 8, 9, 10, 11, 12, 13

Thistlethwaite v. City of New York, 497 F. 2d 339 (2nd Cir.), *cert. den.*, 419 U. S. 1093 (1974) 11

Williams v. Liberty, 461 F. 2d 325 (7th Cir. 1972) 12

Winters v. Lavine, 574 F. 2d 46 (2nd Cir. 1978) 11

Wolff v. Rice, 428 U. S. 465 (1976) 11, 13

Statutes

28 U. S. C. § 1343 7

28 U. S. C. § 2254 11

42 U. S. C. § 1983 . . . . . 7, 8, 9, 11, 12, 13, 17

42 U. S. C. § 1985(3) 7

Reports

Administrative Office of the United States Courts, 1973 Annual Report 13

Administrative Office of the United States Courts, 1978 Annual Report 13

President's Commission on Law Enforcement and Administration of Justice (1967) 4, 5

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by Jack L. Koehr, Esq., City Counselor and John J. FitzGibbon, Esq., Associate City Counselor, Saint Louis, Missouri, counsel for the Petitioners, and by Morris A. Shenker, Esq., and Andrew F. Puzder, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court. States and municipal-county governments are not required to obtain consent to file as *amicus curiae.*

INTEREST OF AMICI

I.

GENERAL INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, its purposes are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives *AELE* seeks to represent, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime. It also provides legal research assistance in support of responsible law enforcement activities, principally through the *amicus curiae* process in the courts.

AELE has previously appeared as *amicus curiae* thirty-three times in the Supreme Court of the United States, and twenty-

six times in other appellate courts, including the federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois and Missouri.

The Attorney General of the State of Maryland is an elected and constitutional official and is the chief legal officer of his State. He has specific responsibility for defending civil rights suits brought against members of the Maryland State Police, elected sheriffs, State correctional officials and employees in the State of Maryland.

The City Attorney of the City and County of San Francisco is an elected and charter official and is the chief legal officer of his jurisdiction. In a combined city-county government approximately the size of the City of St. Louis, the petitioning jurisdiction, he has specific responsibility for defending members of the San Francisco Police and Sheriff's departments.

Together these legal officers represent law enforcement officers in every category of state, county and municipal government. They share a concern for the growing number of civil suits filed against law enforcement officers, many of which are litigated in the federal courts.

II.

SPECIFIC INTEREST OF AMICI

Our interest arises from the important constitutional and policy questions pertaining to police activity in general, and in particular the type of activity involved in the instant case. We are vitally concerned with the issue of finality in Fourth Amendment claims and the need to protect law enforcement officers from the avalanche of groundless civil litigation they will face as a result of the decision of the Eighth Circuit Court of Appeals. It is our belief that it is desirable to fully explore and discuss the legal and policy issues of interest to law enforcement agencies, and that a full airing of the issues will aid the court in understanding the critically important law enforcement

interest in this case and in putting all of the issues into the broadest possible perspective.

Apart from our desire to give voice to the American public concerned about crime and its consequences, we believe that it is important to also express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain the lawfulness of a particular law enforcement activity such as the search and seizure that was conducted by the police officers in this case. This position can be assumed by an *amicus* whereas it may not be available to a litigant. The importance of our stating these views is obvious in the light of the following considerations set forth in the *President's Commission on Law Enforcement and Administration of Justice* 94 (1967):

> . . . many . . . decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs against human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation.

We stress that our law abiding citizens and the police have much at stake in this case, involving as it does the ability of the police to engage in lawful investigative activities without the constant threat of being mulcted in damages by prisoners filing *pro se* suits months or years after the complained-of conduct, and *after* the constitutional claims have been decided adversely to them in a full and fair hearing in a state court. If the police are to be called upon to protect the public and themselves in situations such as presented by the facts of this case, they them-

selves must be protected from the ever-present spectre of frivolous and harassing law suits in performing their sworn duty. They cannot be expected to constantly keep their eyes on the possibility of law suits while attempting to perform their duty, otherwise it would be futile to expect them to effectively perform that duty. If they cannot be so protected by the courts in the proper and reasonable application of principles of finality in litigation that fully comport with due process, then it may be doubted whether any agency of government can protect our citizens from the lawless elements that continue to plague our communities.

The policeman's role is vital to the security of a Free Society, as noted in the *President's Commission Report, supra,* at p. 92:

> In society's day-to-day efforts to protect its citizens from the suffering, fear, and property loss produced by crime and the threat of crime, the policeman occupies the front line. It is he who directly confronts criminal situations, and it is to him that the public looks for personal safety. The freedom of Americans to walk their streets and be secure in their homes—in fact, to do what they want when they want—depends to a great extent on their policemen.

We ask this Court to do no more than it has already done in reaffirming those principles of finality in the civil litigation process that will make it possible for the police to continue their difficult tasks, while fully protecting individuals who have meritorious claims of violation of their civil rights. This balance has already been struck by this Court many times as will be subsequently shown, and we ask the Court not to recede from the appropriate application of the principles of law inherent in those decisions.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE*

In the late evening hours of April 9, 1977, several policemen from the Tactical Anti-Crime Team of the St. Louis Police Department went to a home intending to make a purchase of narcotics at that location and then arrest the seller. Two officers, Jacobsmeyer and Allen, went up to the door of the premises and knocked. The remaining officers secreted themselves at the rear of the house and near the front door. Respondent opened the door and Officer Allen said they had been sent by one Murphy and wanted to buy "two caps" or "two buttons" of heroin. Respondent stated that they should wait while he got what they wanted. He then left the doorway, closing the door until it was slightly ajar. Officers Jacobsmeyer and Allen signalled to the nearby police officers who moved closer to the doorway but still attempted to remain concealed. All of the police officers were dressed in casual clothing, although all of them except officers Jacobsmeyer and Allen wore armbands and caps identifying them as members of the tactical unit. Approximately thirty seconds after leaving the doorway, Respondent returned and began firing at officers Jacobsmeyer and Allen. Both were hit. The other police officers then began firing into the house and were shortly joined by a large number of uniformed police responding to a radio call for assistance. Many of these officers also began firing into the house. After five or ten minutes the police ceased firing and by loudspeaker announced to any occupants of the house that the house was surrounded and they should surrender. Respondent and his father then left the house, unarmed, and were arrested. Upon a search

* The statement of facts is taken from the opinion of the Missouri Court of Appeals, Eastern District, Division One, *State* v. *McCurry*, No. 39999, filed August 14, 1979, and not from the record of the trial court.

of the house heroin was discovered on a dresser top in a bedroom. A pistol from which the bullet which hit officer Jacobsmeyer was discharged was found and a shotgun was also found. These items were in plain view. Additional contraband was found in dresser drawers and hidden in some tires on a porch. These items were not in plain view. After a hearing on Respondent's motion to suppress evidence, the trial court sustained the motion as to those items found in the dresser drawers and the tires and denied the motion as to the items in plain view.

Respondent contended at trial that he believed the men at the door were burglars trying to force their way into his house, that he removed a pistol from his back pocket and fired at them and that he would not have done so had he realized they were police officers.

Following his state conviction on one count of illegal possession of heroin and two counts of assault with intent to kill with malice aforethought, and while his state appeal was pending (which affirmed the conviction), Respondent commenced a *pro se* action in the United States District Court for the Eastern District of Missouri. The complaint sought damages from individual police officers "for the violation of the U. S. Constitutional Rights of the Plaintiff." It was construed to allege that (1) the police officers conspired to conduct an illegal search of Respondent's home; (2) an illegal search of Respondent's home was carried out; and (3) Respondent was assaulted after being arrested. The action was apparently brought under 42 U. S. C. §§ 1983, and 1985(3), with federal jurisdiction invoked under 28 U. S. C. § 1343.

Subsequent to the filing of the complaint, Petitioners moved for dismissal and also for partial summary judgment on the claim of illegal search. The District Court granted the motion for summary judgment, holding that Respondent was collaterally estopped to litigate the legality of the search because an identical claim had been presented to the state court in the

criminal prosecution and the search had been held lawful, although certain items not found in plain view had been suppressed. The District Court also dismissed the remainder of the complaint for reasons not here material. *McCurry* v. *Allen,* 466 F. Supp. 514 (E. D. Mo. 1978).

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court in all respects. *McCurry* v. *Allen,* 606 F. 2d 795 (8th Cir. 1979). Although the court acknowledged that "the search and seizure aspect of his [McCurry's] claim was . . . essentially the same claim that was litigated at the suppression hearing", 606 F. 2d at 797, it nevertheless concluded that collateral estoppel was not available to the police officers as a defense. The basis for this decision was stated as follows: "We conclude that because of the special role of the federal courts in protecting civil rights . . ., and because habeas corpus is now unavailable to appellant, see *Stone* v. *Powell,* [428 U. S. 465 (1976)], it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims." 606 F. 2d at 799. In so holding, the Court of Appeals denied that it was passing on the general question of "whether collateral estoppel applies to § 1983 actions when the issues raised in the § 1983 suit were determined adversely to the § 1983 plaintiff in an underlying state criminal trial." 606 F. 2d at 797-798.

Petition for a writ of certiorari was filed by Petitioners to the United States Court of Appeals for the Eighth Circuit, which petition was granted on February 19, 1980.

ARGUMENT

I.

A CONVICTED FELON IS PRECLUDED UNDER THE RULE OF STONE v. POWELL FROM MAINTAINING AN ACTION FOR DAMAGES UNDER 42 U. S. C. § 1983 ON THE BASIS THAT THE SAME CLAIM OF UNLAWFUL SEARCH AND SEIZURE WAS RAISED, FULLY LITIGATED, AND ADJUDICATED ADVERSELY TO HIM IN A PRIOR STATE CRIMINAL PROCEEDING, AND ON THE BASIS OF FEDERALLY FORMULATED RULES OF RES JUDICATA AND COLLATERAL ESTOPPEL

As is the custom of *AELE* when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the Petitioners in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, as already stated, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide.

When issues are presented to a federal court in the context of a § 1983 action, and those same issues have been fully and completely litigated in a state court or could have been fully and completely litigated in a state court, res judicata principles bar the relitigation of these same issues in the federal court. Res judicata estops not only as to every ground of recovery or defense actually presented in the state court action, but also as to every ground which might have been presented. See, *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973); *Coogan* v. *Cincinnati Bar Association*, 431 F. 2d 1209 (6th Cir. 1970); *Garner* v. *Louisiana State Board of Education*, 489 F. 2d 91 (5th Cir. 1974).

Separate and apart from the issue of res judicata, the Respondent should be barred from relitgating these issues under the doctrine of collateral estoppel. Collateral estoppel would apply as to issues actually litigated and decided in the Missouri state court proceedings even where the parties are not the same. Neither res judicata nor collateral estoppel should be bypassed in the instant case solely on the grounds that respondent alleges a violation of a federally guaranteed constitutional right. State courts also have the power and authority to pass upon federal constitutional issues. See, *Robb* v. *Connelly,* 111 U. S. 624 (1884); *Loveli* v. *Laliberte,* 498 F. 2d 1261 (1st Cir. 1974); *Mastracchio* v. *Ricci,* 498 F. 2d 1257 (1st Cir. 1974); and *Brown* v. *DeLayo,* 498 F. 2d 1173 (10th Cir. 1974).

Most importantly, this Court in *Stone* v. *Powell,* 428 U. S. 465 (1976), held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U. S. at 495. *Amici* submit that *Stone* v. *Powell* must be read as standing for the proposition that rules of federal law fashioned by federal judges ought to be enunciated with an eye toward fostering judicial economy and federal-state comity, without sacrificing the interests of justice. Like the exclusionary rule that is applied in Fourth Amendment claims, res judicata and collateral estoppel are essentially judge-made rules, and are probably more deeply embedded in Anglo-American jurisprudence than the relatively newer exclusionary rule. Many of the considerations underlying res judicata and collateral estoppel—e.g., conservation of judical time, preservation of respect for the administration of justice, and prevention of harassment of litigants—also underlie the rationale of *Stone* v. *Powell.* We submit that so long as state courts provide an opportunity for full and fair litigation of Fourth Amendment claims, this Court should continue to apply the federal rules of collateral estoppel

to § 1983 actions based on identical claims, and that this is fully consistent with the rule and logic of *Stone* v. *Powell.*

We note, parenthetically, that the companion case to *Stone* was *Wolff* v. *Rice,* which also arose from the Eighth Circuit. In its panel decision, the Eighth Circuit concluded that federal habeas corpus was available to convicted state inmates who challenged the legality of a search and seizure, 513 F. 2d 1280 (8th Cir. 1975). The State of Nebraska in *Rice* unsuccessfully moved for a rehearing and a rehearing *en banc.* In *Stone* and *Rice,* the opinions of the Eighth and Ninth Circuits were reversed by this Court, 428 U. S. at 496-497.

It would appear that the Eighth Circuit is attempting, in the instant case, to circumvent the results of this Court's decision in *Stone* and *Rice.* Unable to entertain a collateral attack on a state conviction by habeas corpus under 28 U. S. C. § 2254, they now seek to predicate jurisdiction through 42 U. S. C. § 1983.

In reality the Eighth Circuit Court of Appeals has invited state prisoners to subvert this Court's holding in *Stone* v. *Powell* by means of § 1983 actions, and has unilaterally sought to change long-standing and well-established rules of collateral estoppel in § 1983 actions based on alleged Fourth Amendment violations. In doing so it succeeded in attaining the curious distinction of aligning itself against nearly every federal court that has addressed the issue. Those courts have uniformly held that res judicata and collateral estoppel apply in § 1983 actions and that prior state civil and criminal judgments are to be given preclusive effect, even when constitutional issues are involved. See, *Martin* v. *Delcambre,* 578 F. 2d 1164 (5th Cir. 1978); *Winters* v. *Lavine,* 574 F. 2d 46 (2nd Cir. 1978); *Rimmer* v. *Fayetteville Police Dept.,* 567 F. 2d 273 (4th Cir. 1977); *Mastracchio* v. *Ricci, supra; Thistlethwaite* v. *City of New York,* 497 F. 2d 339 (2nd Cir.), *cert. den.,* 419 U. S. 1093 (1974); *Brazzell* v, *Adams,* 493 F. 2d 489 (5th Cir. 1974); *Metros* v. *United States District Court,* 441 F. 2d 313

(10th Cir. 1970); *Kauffman* v. *Moss*, 420 F. 2d 1270 (3rd Cir.), *cert. den.*, 400 U. S. 846 (1970); compare *Brubaker* v. *King*, 505 F. 2d 534 (7th Cir. 1974) with *Williams* v. *Liberty*, 461 F. 2d 325 (7th Cir. 1972). Compare *Mulligan* v. *Schlachter*, 389 F. 2d 231 (6th Cir. 1968) with *Curtis* v. *Tower*, 262 F. 2d 166 (6th Cir. 1959); but see *Ney* v. *California*, 439 F. 2d 1285 (9th Cir. 1971).

We respectfully invite this Court to dispell the asserted concern of the Court of Appeals as little more than a thinly veiled attempt to emasculate the policy considerations underlying this Court's holding in *Stone*, when the court states that "if collateral estoppel is to apply in § 1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution." 606 F. 2d at 798.

II.

AFFIRMANCE OF THE DECISION OF THE COURT OF APPEALS WILL ENCOURAGE INNUMERABLE STATE PRISONERS TO SEEK RELITIGATION OF FOURTH AMENDMENT AND OTHER CONSTITUTIONAL CLAIMS UNDER 42 U. S. C. § 1983 AND WILL SUBJECT INCREASING NUMBERS OF LAW ENFORCEMENT OFFICERS TO THE HARASSMENT AND VEXATION OF GROUNDLESS CIVIL LITIGATION

Amici readily admit that they will not endear themselves to the plaintiffs' bar and related interests by pointing out to this Court the practical ramifications for law enforcement in this country of the decision of the court below, if affirmed. We have referred to the likelihood of an avalanche of groundless civil litigation that will be engendered by that decision. The term "avalanche" is pictorial, but apt. So is the term "torrent." The latter term was applied to the dramatic growth of civil rights litigation in recent years by Mr. Justice Rehnquist in his dissent in *Monell* v. *Dept of Social Services*, 436 U. S. 658 (1978).

The statistics of filings of civil rights actions in the federal district courts substantiate the validity of Justice Rehnquist's warning. Such filings during the period 1961 to 1973 grew from 261 to 7,679. *Administrative Office of the United States Courts, 1973 Annual Report* 128. During the fiscal years 1974 through 1978, filings of all types of actions by state prisoners alone grew from 13,423 to 16,969. *Administrative Office of the United States Courts, 1978 Annual Report* 60. During fiscal 1977 and 1978, while all categories of prisoner filings increased 12.2%, civil rights suits filed by prisoners increased 25.9% to 10,366. *Id.*, 61. Between 1970 and 1978, civil rights complaints filed by state prisoners increased 379.3%, totaling some 9,730 in 1978. *Id.*, 75-76. All prisoner filings increased 907.1% between 1960 and 1978, while general civil filings grew a mere 134.1% by comparison. *Id.*, 77.

Amici submit that the decision of the Eighth Circuit Court of Appeals can only encourage this monstrous increase in federal civil rights litigation by state prisoners, while producing the anamolous result that insufficient attention will be paid to meritorious claims by judges reacting to the outrage of suffocating numbers of frivolous claims assaulting their dockets. Respondent may be pleased to find himself in the highest court of the land with his claim today, but many prisoners who are less fortunate to gain the ear of a federal court judge with a meritorious claim will not applaud his effort. And while the Court of Appeals professed to limit the application of its decision to Fourth Amendment claims couched in the typical *Stone* v. *Powell* setting, its refusal to give preclusive effect to the Missouri state court judgment threatens the continued application of collateral estoppel rules in § 1983 actions generally, regardless of the underlying constitutional claim. *Amici* submit that, in fact, the decision of the Court of Appeals is little more than a belated, back door attempt to undermine the sound policy basis for this Court's decision in *Stone* and *Rice*.

It can not be doubted that while the incidence of litigation against law enforcement officers will continue to skyrocket, fueled by decisions such as that of the Court of Appeals, legitimate and necessary law enforcement activities will be adversely affected by the flood of frivolous litigation. If present trends continue, perhaps in excess of 26,000 lawsuits will be filed against law enforcement personnel in 1980 in the state and federal courts. Some 21,000 will allege false arrest, brutality, wrongful death and other intentional misconduct; another 5,000 will claim motor vehicle negligence. *Amicus AELE* recently completed a preliminary analysis of its second five-year survey of state and federal police misconduct litigation. The ten-year totals shown in Table 1 indicate that from 1967 through 1976, civil suits against the police rose by 517 percent. In addition to the great increase in suits filed in federal courts, it appears that the number of suits filed in the state courts has also increased dramatically. In fact, approximately four out of every five suits alleging misconduct or civil rights violations were filed in the state courts, refuting the inference that the state courts are oblivious to such claims.

Table 1 — Projected Number of Suits Filed Against State, County & Local Officers

The projected number of suits in state and federal courts, plus vehicular claims, appears in table 1.

Year Suit Filed	Suits in State Courts (Misconduct)	Suits in Federal Courts (Civil Rights)	Motor Vehicle Suits	Total Suits Filed	Misconduct Suits Per 1000 Officers
1967	1,556	167	450	2,173	5.46
1968	1,665	189	484	2,338	5.58
1969	2,045	322	618	2,985	6.53
1970	2,201	794	783	3,778	7.77
1971	2,318	1,545	1,009	4,872	9.30
1972	2,645	1,101	979	4,725	8.05
1973	3,744	1,044	1,250	6,038	9.72
1974	5,959	1,671	1,994	9,624	15.11
1975	6,750	2,178	2,335	11,263	17.11
1976	8,007	2,626	2,778	13,411	19.64

This decennial analysis was undertaken by *AELE* to measure both the positive and adverse effects of lawsuits on police per-

formance. Restrictive court decisions in criminal cases have well-known and frequently documented adverse effects; however, the threat of damage awards and injunctive relief can also undermine police effectiveness. An estimated one million hours are annually consumed investigating civil suits against police, and an equal or greater amount of time is spent by attorneys in defending these cases.

No one, of course, can criticize the right of a citizen to sue law enforcement officers for legitimate injuries. However, although some meritorious claims are settled, less than *four percent* of all suits filed ever result in a plaintiff's verdict. The vast majority of cases are groundless and are dismissed by the courts for lack of a viable cause of action or are voluntarily dropped by plaintiffs. Of those that *actually go to trial,* plaintiffs recover in only 25.77% of the cases. Many such cases are filed to harass conscientious police officers, to obtain revenge, or to provoke discussions leading to the dismissal or reduction of criminal charges pending against a plaintiff. The two five-year surveys included a cross-section of 2,060 law enforcement agencies that, in 1977, employed 153,130 officers, or about one-fourth of the nation's total. Table 1 projects the number of suits for the entire law enforcement establishment.

AELE concedes that civil litigation provides an added incentive for police administrators to continually evaluate departmental procedures and monitor practices of specific officers. The overwhelming volume of suits, however, whether based upon Fourth Amendment claims or other alleged violations of constitutional rights, is counterproductive to this end. Frivolous claims in large numbers numb or desensitize a responsible law enforcement executive. Truly legitimate complaints are overshadowed by thousands of frivolous claims.

The survey indicates that the number of federal and state civil suits for misconduct against city police, county sheriff's personnel and state patrol officers increased from an estimated 1,723

suits in 1967 to 10,633 in 1976. In 1976 a typical law enforcement agency received one civil suit for every 51 full-time officers. The rise in civil suits during this ten-year period was steady and dramatic, as seen in Table 1 and in the graph at Figure 1.

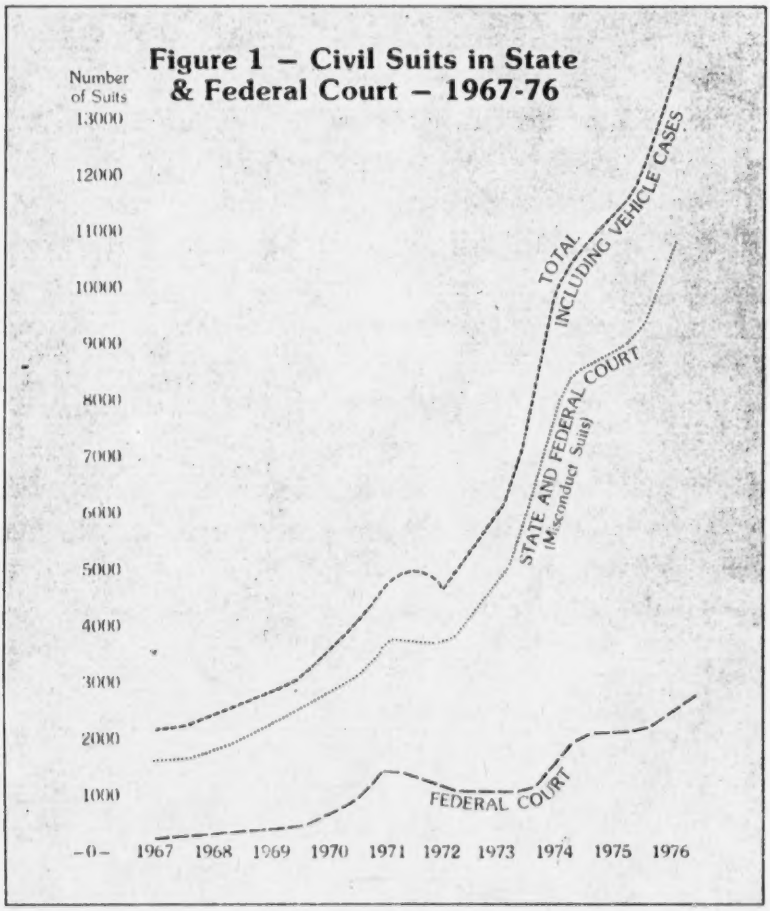

Table 2 indicates the status of suits filed for the two five year periods where disposition is known. The disposition is not surprising. More suits, as a percentage, were still pending in 1976 than in 1971. More were settled, perhaps to reduce the number of pending claims, and perhaps because police—as defendants —have a clearer picture of their liability.

Table 2

STATUS	PERCENT OF SUITS BY STATUS 1967-71	1972-76
Suits still pending	32.1	41.2
Suits settled	14.4	22.5
Dropped by plaintiffs or dismissed on a motion	29.4	22.6
Number tried in court which police WON	19.6	10.1
Number tried in court which police LOST	4.5	3.5

These statistics dramatically illustrate the need for this Court to avoid further exacerbation of the litigation explosion involving law enforcement officers that has overtaken our state and federal courts. *Amici* respectfully submit that affirmance of the application of uniform federal rules of collateral estoppel to § 1983 actions will assure that meritorious claims receive prompt, effective attention from state and federal courts, while at the same time protecting law enforcement officers from the harassment and vexation of groundless civil litigation.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals, Eighth Circuit, should be reversed on the law and on the basis of sound judicial policy.

Respectfully submitted,

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